273 N.C. App.—No. 2 Pages 220-407

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JULY 8, 2021

MAILING ADDRESS: The Judicial Department
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OF
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[1]Retired 31 December 2020. [2]Appointed Chief Judge 30 December 2020 and sworn in 1 January 2021. [3]Retired 31 December 2020.
[4]Resigned 31 December 2020. [5]Term ended 31 December 2020. [6]Term ended 31 December 2020. [7]Sworn in 1 January 2021.
[8]Sworn in 1 January 2021. [9]Sworn in 1 January 2021. [10]Sworn in 1 January 2021. [11]Appointed 30 December 2020 and sworn in 6 January 2021.

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COURT OF APPEALS

CASES REPORTED

FILED 1 SEPTEMBER 2020

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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Economic Protection Act of 2009. Because a claim had already been filed and a judgment rendered, this action involved the judgment—not the underlying debt claim—and plaintiff was not acting as a collection agency but as a party seeking to enforce a previous judgment. Therefore, the pleading requirements of the Act were inapplicable. **Unifund CCR Partners v. Hoke, 401.**

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SCHEDULE FOR HEARING APPEALS DURING 2021

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks:

January 11 and 25

February 8 and 22

March 8 and 22

April 12 and 26

May 10 and 24

June 7

August 9 and 23

September 6 and 20

October 4 and 18

November 1, 15, and 29

December 13

Opinions will be filed on the first and third Tuesdays of each month.

D C CUSTOM FREIGHT, LLC, PLAINTIFF
v.
TAMMY A. ROSS & ASSOCIATES, INC., DEFENDANT

No. COA19-1059

Filed 1 September 2020

1. Insurance—Action against agent—negligence claim based on failure to procure insurance coverage—agent's duty limited to coverage requested

Where plaintiff-trucking company engaged defendant-insurance agent to procure coverage for vehicles rented by plaintiff from a third party, plaintiff rented vehicles on both long-term and short-term leases but the policy obtained by defendant only covered vehicles on long-term leases, and plaintiff's claim was denied when a vehicle on short-term lease was damaged in a collision, summary judgment was properly granted to defendant on plaintiff's claim for negligence for failure to use reasonable skill, care, and diligence in procuring insurance for plaintiff. There was no evidence that plaintiff requested coverage for short-term leases, and since defendant's duty was limited to securing the coverage requested by the policyholder, any failure to recommend additional insurance did not constitute negligence.

2. Insurance—Action against agent—breach of contract—no duty beyond requested coverage—no additional duty in contract created by Certificate of Insurance

Where plaintiff-trucking company engaged defendant-insurance agent to procure coverage for vehicles rented by plaintiff from a third party, plaintiff rented vehicles on both long-term and short-term leases but the policy obtained by defendant only covered vehicles on long-term leases, and plaintiff's claim was denied when a vehicle on short-term lease was damaged in a collision, summary judgment was properly granted to defendant on plaintiff's claim for breach of contract for failure to procure insurance covering short-term rentals. There was no evidence that plaintiff requested coverage for short-term rentals and defendant only had a duty to procure the coverage requested by plaintiff. A Certificate of Insurance provided by defendant to the third-party lessor which implied coverage for all vehicles did not create an additional duty in contract.

3. Insurance—Action against agent—unfair and deceptive trade practices—misrepresentation of terms of policy to third party—necessity of reliance

Where plaintiff-trucking company engaged defendant-insurance agent to procure coverage for vehicles rented by plaintiff from a third party, plaintiff rented vehicles on both long-term and short-term leases but the policy obtained by defendant only covered vehicles on long-term leases, and plaintiff's claim was denied when a vehicle on short-term lease was damaged in a collision, summary judgment was properly granted to defendant on plaintiff's claim for unfair and deceptive trade practices despite the fact that defendant provided Certificates of Insurance to the third-party lessor which implied coverage for all vehicles. Because the Certificates of Insurance containing the misrepresentations were sent to a third party and were never seen by plaintiff prior to the collision which gave rise to this case, there was no evidence plaintiff relied on the misrepresentations in its decision-making process.

Appeal by Plaintiff from Order and Judgment entered 26 September 2019 by Judge Kevin Bridges in Union County Superior Court. Heard in the Court of Appeals 28 April 2020.

The Duggan Law Firm, PC, by Christopher Duggan, and The Fitzgerald Dwyer Law Firm, PC, by Peter Dwyer, for Plaintiff-Appellant.

Parker Poe Adams & Bernstein LLP, by Jason R. Benton and Jessica C. Dixon, for Defendant-Appellee.

INMAN, Judge.

The primary question in this case is whether a claim for unfair and deceptive trade practices against an insurance agent, based on the agent's misrepresentation to a third party of the terms of a policy, can be maintained absent evidence that the plaintiff relied on the misrepresentation. We hold that North Carolina Supreme Court precedent precludes such a claim absent evidence that the plaintiff's actual and reasonable reliance on a misrepresentation caused the claimed damages.

Plaintiff D C Custom Freight, LLC, filed suit against its insurance agent, Defendant Tammy A. Ross & Associates, Inc., after Defendant sent documents to a third party implying that Plaintiff's coverage was broader than what was contained in the policy. Plaintiff was left without

coverage when a truck it rented from the third party was involved in an accident. Plaintiff appeals from: (1) the trial court's grant of summary judgment for Defendant on Plaintiff's claims for negligence, breach of contract, and unfair and deceptive trade practices ("UDTP"); and (2) the trial court's denial of Plaintiff's motion to amend its complaint asserting those claims.

We affirm the trial court's decision. This case is controlled by our Supreme Court's decision in *Bumpers v. Community Bank of Northern Virginia*, 367 N.C. 81, 747 S.E.2d 220 (2013), which holds that UDTP claims based on misrepresentation require a showing of both actual and reasonable reliance to prove that the misrepresentation caused damages. We hold that this requirement extends to claims made within the insurance industry context, in which certain practices are defined as unfair or deceptive under N.C. Gen. Stat. §58-63-15. We also hold that Plaintiff has failed to produce evidence sufficient to support a claim for negligence or breach of contract. The trial court's grant of summary judgment was therefore proper as to each of Plaintiff's claims. For the same reasons, we affirm the trial court's denial of Plaintiff's motion to amend those claims as futile.

I. FACTUAL AND PROCEDURAL HISTORY

Plaintiff is a freight shipping and trucking company operating in North and South Carolina. Defendant is an insurance agent and broker. In 2016 Plaintiff engaged Defendant to procure commercial automobile insurance coverage, providing Defendant with a list of Plaintiff's equipment and a copy of its former insurance policy to use as a "go-by." Through Defendant, Plaintiff purchased a policy from Wesco Insurance Company ("Wesco") covering the period from 11 March 2017 to 11 March 2018 (the "2017-2018 policy"). Plaintiff used rented vehicles in its business, including trucks rented from Rush Enterprises, Inc. ("Rush"), some via long-term leases and some via short-term rentals. The long-term leased trucks were individually listed in the 2017-2018 policy and covered for physical damage. Trucks rented on a short-term basis were not individually enumerated and were not covered by the policy.

On 6 December 2017, Rush's insurance company requested that Defendant send a Certificate of Insurance ("COI") that showed Plaintiff's liability insurance limits and physical damage deductibles for leased or rented vehicles. Defendant prepared and sent a COI to the insurer and to Plaintiff. This certificate (the "December COI") indicated only that the policy provided liability coverage. The certificate did not mention collision coverage. The insurer requested an amended certificate that listed

coverage limits and deductibles for comprehensive and collision coverage. Defendant sent a second COI (the "revised December COI") to the insurer, revised to add the entry "Specified Perils/Collision Deductibles: $2500." The revised December COI was not sent to Plaintiff.

The next year, Plaintiff renewed the insurance policy it had purchased through Defendant, covering the term of 11 March 2018 through 11 March 2019. Defendant sent a third COI to Rush's insurer (the "March COI"), which was identical to the revised December COI except that it listed a $3000 deductible for "Specified Perils/Collision." The March COI, like the revised December COI, was sent only to Rush's insurer and not to Plaintiff.

In June 2018, Plaintiff rented a truck from Rush on a short-term basis. The short-term rental agreement with Rush required Plaintiffs to provide collision insurance for the truck. In July the rented truck was damaged in a collision. Plaintiff submitted a claim to Wesco. The claim was denied because short-term rentals were not covered by Plaintiff's policy.

Plaintiff filed suit against Defendant, asserting claims for fraudulent misrepresentation, negligence, breach of contract, fraudulent concealment, and unfair and deceptive trade practices. Defendant moved for summary judgment as to all of Plaintiff's claims. Plaintiff then moved to amend its complaint and for summary judgment on its breach of contract and UDTP claims. Plaintiff's proposed amended complaint removed its claim for fraudulent concealment, replaced its claim for fraudulent misrepresentation with a claim for negligent misrepresentation, and added factual allegations regarding the certificates of insurance. Plaintiff later supplemented its motion to amend with a revised amended complaint, which modified its negligent misrepresentation claim into one based in simple negligence. Plaintiff also withdrew its motion for summary judgment on breach of contract.

Following a hearing, the trial court denied Plaintiff's motion to amend the complaint, denied Plaintiff's motion for summary judgment on its UDTP claim, and granted Defendant's motion for summary judgment on all of Plaintiff's claims. Plaintiff appeals.

II. ANALYSIS

Although Plaintiff asserted additional claims in its complaint, its notice of appeal only contests the trial court's grant of summary judgment and denial of its motion to amend as to its claims for negligence, breach of contract, and unfair and deceptive trade practices. Plaintiff

also contests the trial court's denial of its motion for summary judgment as to unfair and deceptive trade practices. We address each cause of action in turn.

A. *Standard of Review*

Summary judgment is properly granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56 (2019). The court must examine the evidence in the light most favorable to the non-moving party and give that party the benefit of all reasonable inferences. *Jenkins v. Lake Montonia Club, Inc.*, 125 N.C. App. 102, 104, 479 S.E.2d 259, 261 (1997). We review trial court rulings on motions for summary judgment *de novo*. *Horne v. Town of Blowing Rock*, 223 N.C. App. 26, 32, 732 S.E.2d 614, 618 (2012). Under *de novo* review, we consider the matter anew and freely substitute our own judgment for that of the trial court. *Id.*

We review a trial court's denial of a motion to amend for abuse of discretion. *Delta Envtl. Consultants of N. Carolina, Inc. v. Wysong & Miles Co.*, 132 N.C. App. 160, 165-66, 510 S.E.2d 690, 694 (1999). Denying a motion to amend without any apparent justification is an abuse of discretion, but when the trial court states no reason for the denial we may examine any apparent reasons for the ruling. *Id.* Proper reasons for denial include futility of the amendment. *Id.* "When an amendment would be futile in light of the propriety of summary judgment on a plaintiff's claim, it is not an abuse of discretion for the trial court to deny the amendment." *N. Carolina Council of Churches v. State*, 120 N.C. App. 84, 93, 461 S.E.2d 354, 360 (1995).

B. *Negligence*

[1] Plaintiff contends in its negligence claim that Defendant, because it failed to procure insurance coverage for short-term rental trucks, violated its duty to "use reasonable skill, care and diligence" in procuring insurance for Plaintiff. *Holmes v. Sheppard*, 255 N.C. App. 739, 744, 805 S.E.2d 371, 375 (2017). We disagree.

An insurance agent's duty in procuring insurance is limited to securing the coverage that the policyholder has requested. *Baggett v. Summerlin Ins. and Realty, Inc.*, 143 N.C. App. 43, 50-51, 545 S.E.2d 462, 467 (Tyson, J., dissenting), *rev'd for reasons stated in the dissent*, 354 N.C. 347, 554 S.E.2d 336 (2001). Failure to recommend additional insurance to cover a risk faced by the policyholder does not constitute

negligence. *See Baldwin v. Lititz Mut. Ins. Co.*, 99 N.C. App. 559, 562, 393 S.E.2d 306, 308 (1990) (no reasonable expectation that defendant insurance agent recommend or procure coverage for home after builder's policy lapsed at completion of construction); *Phillips by Phillips v. State Farm Mut. Auto. Ins. Co.*, 129 N.C. App. 111, 113, 497 S.E.2d 325, 327 (1998) (insurance agent had no duty to inform client that increasing liability coverage limits would make him eligible for uninsured motorist coverage).

In this case, Plaintiff has not presented evidence raising a genuine issue of material fact regarding whether Plaintiff requested that Defendant obtain coverage for the short-term rental trucks. When seeking insurance coverage, Plaintiff provided Defendant a copy of its previous insurance policy, which did not cover short-term rentals. Plaintiff argues that its representative told Defendant that Plaintiff engaged in short-term rentals, and that this constituted a request for coverage. Considering the testimony in the light most favorable to Plaintiff, it does not show a request for coverage of short-term truck rentals, and it does not show that Defendant promised to obtain such coverage. Defendant had no duty to procure coverage beyond what Plaintiff actually requested.

Plaintiff compares this case to *Holmes v. Sheppard*, 255 N.C. App. 739, 805 S.E.2d 371 (2017). In *Holmes*, after the plaintiff's insurance claim was denied because the policy did not provide coverage for vacant property, the plaintiff sued his insurance agent for failing to obtain that coverage. 255 N.C. App at 742, 805 S.E.2d at 373. The plaintiff testified that he requested the coverage while his property was vacant and told the insurance agent that he "did not want to have another issue because of vacancy," as a previous claim he had filed was denied due to a vacancy exclusion. *Id.* at 744, 805 S.E.2d at 375. We held that this testimony was sufficient to raise a genuine issue of material fact as to whether the plaintiff had requested the coverage and we reversed the trial court's grant of summary judgment for the defendant. *Id.* at 745, 748-49, 805 S.E.2d at 375, 377-78.

This case is distinguishable from *Holmes*. There is no evidence that Plaintiff communicated to Defendant a request to insure short-term rentals. The previous insurance policy Plaintiff provided to Defendant as an example of the coverage needed did not include coverage for short-term rentals. Plaintiff presented no evidence that it requested greater or different coverage from that provided in the previous policy. And, unlike in *Holmes*, Plaintiff did not make a statement expressly indicating a desire to rectify a gap in coverage. On these facts, and considering the

evidence in the light most favorable to Plaintiff, we hold that Plaintiff has failed to demonstrate a genuine issue of material fact as to whether it requested the insurance coverage at issue, and in turn as to whether Defendant owed a duty of care to obtain such coverage. We conclude that the trial court properly granted summary judgment on Plaintiff's negligence claim.

Plaintiff's initial complaint also asserted a claim for fraudulent misrepresentation based on Defendant's issuance of the COI to Rush Enterprises misrepresenting Plaintiff's coverage. The trial court granted Defendant's motion for summary judgment on that claim. Plaintiff's proposed amended complaint added a claim for negligence based on Defendant's representation to Rush. Because Plaintiff has not argued on appeal that either the fraudulent misrepresentation claim or a negligence claim based on that misrepresentation should have survived summary judgment, those issues are abandoned and we do not consider them. N.C. R. App. P. 28(b)(6).

C. *Breach of Contract*

[2] Plaintiff argues that, by failing to procure insurance covering short-term rentals, Defendant breached its contract to act as Plaintiff's insurance agent and broker. We disagree because, as explained above, the evidence does not establish that Plaintiff requested that Defendant procure this coverage.

When an insurance agent has breached its duty to procure insurance requested by the insured, the insured may seek remedy in tort or in contract. *Elam v. Smithdeal Realty & Ins. Co.*, 182 N.C. 599, 604, 109 S.E.2d 632, 634 (1921). To establish a claim for breach of contract, the party asserting the claim has the burden of showing the existence of a valid contract and a breach of the terms of that contract. *Samost v. Duke Univ.*, 226 N.C. App. 514, 518, 742 S.E.2d 257, 260 (2013).

As explained above, Plaintiff has not introduced evidence showing that it requested coverage for short-term rentals. Nor has it shown that the contract between Plaintiff and Defendant extended Defendant's duties beyond the standard requirement that an insurance agent procure the coverage actually requested by the insured.

Plaintiff argues that the issuance of the revised December and March COIs, which implied collision and comprehensive coverage for all vehicles, created a duty that Defendant procure that coverage. However, a COI is distinct from a contract in both law and industry practice:

> A certificate of insurance is not a policy of insurance and does not amend, extend, or alter the coverage afforded

> by the policy to which the certificate of insurance makes reference. A certificate of insurance shall not confer to a certificate of insurance holder new or additional rights beyond what the referenced policy of insurance expressly provides.

N.C. Gen. Stat. § 58-3-150(e) (2019). The COIs at issue in this case provided that they "do[] not constitute a contract between the issuing insurer(s), authorized representative or producer, and the certificate holder." The second and third COIs, which included references to collision or comprehensive coverage, were never sent to Plaintiff before the collision giving rise to this case. Considering the evidence in the light most favorable to Plaintiff, we cannot hold that these COIs created an additional duty in contract.

Plaintiff argues that denying it relief serves as a "shocking notice" to the insurance community that insurers can issue certificates listing anything they like without repercussion. We disagree. Our legislature has prohibited the issuance of COIs that "contain[] any false or misleading information concerning the policy of insurance to which the certificate of insurance makes reference." N.C. Gen. Stat. § 58-3-150(f)(2) (2019). We simply hold that a COI, sent to a third party and never communicated to the insured, without any additional consideration, does not create additional contractual duties owed to the insured.

D. *Unfair and Deceptive Trade Practices*

[3] Plaintiff last argues that the trial court erred in granting summary judgment on its claim for unfair and deceptive trade practices. This claim rests on the intersection of two statutes: N.C. Gen. Stat. § 75-1.1, which creates a private cause of action for UDTP, and N.C. Gen. Stat. § 58-63-15(1), which our courts have held recognizes certain acts within the insurance context as *per se* unfair or deceptive practices. Section 75-1.1 UDTP claims based on a misrepresentation by the defendant generally require a showing that the plaintiff relied on the misrepresentation, leading to its injury. We now consider whether stating a claim in the insurance context, within the scope of Section 58-63-15(1), relieves Plaintiff of the requirement to show reliance. As discussed below, we hold that Plaintiff must show reliance and, because Plaintiff has failed to do so, the trial court properly granted summary judgment on this claim.

Section 75-1.1 of our General Statutes prohibits unfair and deceptive acts between parties engaged in a business transaction. N.C. Gen. Stat. § 75-1.1; *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 252, 507 S.E.2d 56, 63 (1998). To prevail on a UDTP claim under

Section 75-1.1, a plaintiff must show that (1) the defendant committed an unfair or deceptive act or practice (2) in or affecting commerce which (3) proximately caused injury to the plaintiff. *Id.*

Determining whether an act is an unfair or deceptive practice that violates Section 75-1.1 is a question of law. *Gray v. North Carolina Ins. Underwriting Ass'n*, 352 N.C. 61, 68, 529 S.E.2d 676, 681 (2000). Ordinarily, the trial court will determine, based upon the jury's findings, whether the acts engaged in by the defendant were unfair or deceptive practices in or affecting commerce. *Id.* A practice is deceptive if it has the tendency to deceive, and unfair when it "offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Id.* (quotations and citations omitted). In this case that analysis is unnecessary because misrepresenting the terms of an insurance policy is a *per se* deceptive act satisfying the first element of a UDTP claim.

Our legislature has enumerated a number of "unfair and deceptive acts or practices in the business of insurance." N.C. Gen. Stat. § 58-63-15 (2019).[1] Misrepresenting the terms of an insurance policy is one of the proscribed behaviors:

> The following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance:
>
> (1) Misrepresentations and False Advertising of Policy Contracts.–Making, issuing, circulating, or causing to be made, issued or circulated, any estimate, illustration, circular or statement misrepresenting the terms of any policy issued or to be issued or the benefits or advantages promised thereby or the dividends or share of the surplus to be received thereon, or making any false or misleading statement as to the dividends or share or surplus previously paid on similar policies, or making any misleading representation or any misrepresentation as to the financial condition of any insurer, or as to the legal reserve system upon which any life insurer operates, or using any name or title of any policy or class of policies misrepresenting the true nature thereof, or making any misrepresentation

1. Plaintiff's original complaint does not refer to Section 58-63-15, but the amended complaint characterizes the claim as under the section and pleads facts specific to it.

> to any policyholder insured in any company for the purpose of inducing or tending to induce such policyholder to lapse, forfeit, or surrender his insurance.

N.C. Gen. Stat. § 58-63-15 (2019).

Section 58-63-15 is a regulatory statute, enforced by the Commissioner of Insurance, and does not create a private cause of action. However, our Supreme Court has held that a violation of Section 58-63-15(1) is, as a matter of law, an unfair or deceptive act or practice. *Pearce v. American Defender Life Ins. Co.*, 316 N.C. 461, 470, 343 S.E.2d 174, 179 (1986). In *Pearce*, the plaintiff purchased a life insurance policy including an additional payment if he died in an accident. *Id.* at 463, 343 S.E.2d at 176. He later sent a letter to his insurance company informing it that he had joined the Air Force and asking if he was "fully covered." *Id.* The insurance company confirmed that the accidental death rider would be payable "should his death occur while in the Armed Forces but not as the result of an act of war." *Id.* at 464, 343 S.E.2d at 176. The plaintiff died in a training flight, and the insurance company refused to pay benefits under the accidental death rider, citing an exception in the policy. *Id.* at 465, 343 S.E.2d at 177. Our Supreme Court held that the insurance company violated the misrepresentation provision of N.C. Gen. Stat. § 58-54.4 (now codified at N.C. Gen. Stat. § 58-63-15(1)), and that such a violation is a *per se* unfair or deceptive trade practice under Section 75-1.1. *Id.* at 470, 343 S.E.2d at 179.[2]

In this case, Plaintiff's claim is likewise based on a misrepresentation by Defendant regarding what was covered under its policy: the policy did not provide comprehensive or collision coverage to short-term rentals, but the revised December COI and the March COI imply that this coverage exists. Defendant argues that this misrepresentation cannot constitute a deceptive trade practice because it did not gain any advantage in the marketplace from this misrepresentation. However, while examining whether a defendant benefitted from an act may be a factor in determining whether that act is an unfair or deceptive practice, that determination does not need to be made in this case. Misrepresenting the terms of an insurance policy is, as a matter of law, a deceptive act. We need not weigh factors to determine whether this first element of

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2. Section 58-63-15 enumerates thirteen different categories of unfair and deceptive acts or practices in the business of insurance. Not all of these categories have been incorporated as *per se* unfair or deceptive acts satisfying the first element of a UDTP claim. *See, e.g., N.C. Steel, Inc. v. Nat'l Council on Compensation Ins.*, 347 N.C. 627, 632-33, 496 S.E.2d 369, 372 (1998).

a UDTP claim is satisfied, and therefore whether Defendant gained an advantage by its misrepresentation is not relevant to our analysis.[3]

Defendant argues that, because Plaintiff's UDTP claim is based on misrepresentation, Plaintiff must also show that it relied upon the misrepresentation in order to show causation—the third element of a UDTP claim under Section 75-1.1. Defendant contends that Plaintiff cannot show reliance because the revised December and March COIs were never seen by Plaintiff prior to the accident giving rise to this case. We agree.

We previously addressed this question in *Cullen v. Valley Forge Life Insurance Company*, and held that reliance is not a requirement to show causation in a UDTP claim stemming from Section 58-63-15(1). 161 N.C. App. 570, 589 S.E.2d 423 (2003). In *Cullen*, the plaintiff applied for a life insurance policy from the defendant and submitted to a medical examination and released his medical records. 161 N.C. App. at 572-73, 589 S.E.2d at 426-27. Later, the plaintiff applied for additional coverage and underwent a second medical examination, which revealed a blood blister. *Id.* The insurance company denied the additional coverage and sent the plaintiff a letter stating that "no coverage or contract was ever in effect" and "no coverage ever existed." *Id.* at 573, 589 S.E.2d at 427. This statement was a misrepresentation, as the company's internal memos showed that the plaintiff was covered, violating Section 58-63-15(1) and constituting an unfair or deceptive practice as a matter of law. *Id.* at 579, 589 S.E.2d at 430-431. The defendant argued that the plaintiff could not show an injury in the absence of evidence that he relied on the misrepresentation, but we held that a showing of reliance was not required to prove causation. *Id.* at 580, 589 S.E.2d at 431.

However, this holding is called into question by our Supreme Court's decision in *Bumpers v. Community Bank of Northern Virginia*, 367 N.C. 81, 88, 747 S.E.2d 220, 226 (2013). While *Bumpers* concerns a UDTP claim occurring outside of the context of the insurance industry and Section 58-63-15(1), it holds that "a claim under section 75-1.1 stemming from an alleged misrepresentation does indeed require a plaintiff to

3. Defendant cites *Erler v. Aon Risks Services, Inc. of the Carolinas*, in which we held that a misrepresentation by an insurance agent as to the coverage the purchaser would receive did not amount to an unfair or deceptive trade practice because "no unfair advantage was to be gained from defendants' actions." 141 N.C. App. 312, 321, 540 S.E.2d 65, 71 (2000). However, this decision is directly at odds with our Supreme Court's decision in *Pearce*. We are compelled to follow *Pearce*. *See, e.g.*, *Respess v. Respess*, 232 N.C. App. 611, 625, 754 S.E.2d 691, 701 (2014) (acknowledging that where a conflict exists between Supreme Court precedent and a decision of this Court, we are bound to follow the former).

demonstrate reliance on this misrepresentation in order to show the necessary proximate cause." *Id.* at 88-89, 747 S.E.2d at 226-27. In *Bumpers*, the plaintiffs paid loan discount fees to a lender but were not provided discounted loans. *Id.* at 84, 747 S.E.2d at 223. The Supreme Court held that the plaintiffs' claim was based on a misrepresentation, and they could not show proximate cause without presenting sufficient evidence that they actually relied upon the misrepresentation. *Id.* at 89, 747 S.E.2d at 227. Stated directly, "actual reliance requires that *the plaintiff* have affirmatively incorporated the alleged misrepresentation into [their] decision-making process." *Id.* at 90, 747 S.E.2d at 227 (emphasis added).

We are not convinced by Plaintiff's argument—that *Cullen* controls over *Bumpers* because *Bumpers* does not involve the insurance industry. In *Cullen*, we based our holding that no showing of reliance was necessary on two factors. First, neither statute at issue included language requiring reliance. 161 N.C. App. at 580, 589 S.E.2d at 431. Second, we observed that "actual deception is not an element necessary under N.C. Gen. Stat. § 75-1.1 to support an unfair or deceptive practices claim." *Id.* (citing *Johnson v. Insurance Co.*, 300 N.C. 247, 265, 266 S.E.2d 610, 622 (1980), *overruled in part on other grounds*, *Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 374 S.E.2d 385 (1988); *Poor v. Hill*, 138 N.C. App. 19, 29, 530 S.E.2d 838, 845 (2000)). Neither of these reasons is specific to insurance-based claims made under Section 58-63-15(1), and they apply equally to *any* claim made pursuant to Section 75-1.1. In short, *Cullen* itself declined to draw the distinction Plaintiff now asks us to adopt.

Nor does *Pearce*, which recognized misrepresentations in the insurance industry as *per se* deceptive trade practices supporting a UDTP claim, imply that such a claim can be sustained without showing reliance. The Supreme Court compared the causation analysis for such claims to the "detrimental reliance requirement under a fraud claim" and concluded that the insured in that case had presented evidence showing that he relied on assurances from the insurance company that he was covered. *Pearce*, 316 N.C. at 471-72, 343 S.E.2d at 180-81. Plaintiff has not submitted, nor can we identify, any authority or analysis concluding that the element of proximate cause in the insurance context should be treated differently than causation outside of it. For all of these reasons, we hold that, in order to succeed on a UDTP claim arising under Section 58-63-15(1), a plaintiff must show reliance on the misrepresentation.

We also note that the precedents cited in *Cullen* held that evidence of actual deception was not required to establish the first element of a UDTP claim—the presence of an unfair or deceptive trade practice. *See*,

e.g., *Poor*, 138 N.C. App. at 28-29, 530 S.E.2d at 845 ("A practice is deceptive if it 'possesse[s] the tendency or capacity to mislead, or create[s] the likelihood of deception.' " (quoting *Overstreet v. Brookland, Inc.*, 52 N.C. App. 444, 453, 279 S.E.2d 1, 7 (1981)). *Cullen* applied the holding in these cases to the third element—proximate cause—without acknowledging this distinction or explaining why the same analysis should apply to two different elements of a tort.

Prior to *Cullen*, we consistently held that UDTP claims based on an alleged misrepresentation require the plaintiff to show actual reliance on the misrepresentation in order to establish that element. *Tucker v. Boulevard at Piper Glen LLC*, 150 N.C. App. 150, 154, 564 S.E.2d 248, 251 (2002); *Pleasant Valley Promenade v. Lechmere, Inc.*, 120 N.C. App. 650, 664, 464 S.E.2d 47, 58 (1995). Rather than being distinguishable from *Bumpers'* general rule that a showing of reliance on the part of the plaintiff is required, *Cullen* is in direct conflict with that rule. *See Bumpers* at 100, S.E.2d at 234, n. 10 (Beasley, J., dissenting) (citing *Cullen* as authority providing that evidence of reliance is not necessary to support a UDTP claim). Accordingly, we interpret the Supreme Court's decision in *Bumpers* as overruling *Cullen* in this respect and hold that Plaintiff in this case must show reliance to succeed on its UDTP claim.

In this case, Defendant did not send Plaintiff the documents containing the alleged misrepresentations. When Rush's insurer first requested a COI on 6 December 2017, Defendant sent a certificate to both the insurer and to Plaintiff. This initial COI did not suggest that short-term rentals had comprehensive and collision coverage. In fact, the initial COI included no representation that Plaintiff had any insurance coverage other than for liability. One week later, on 14 December 2017, Defendant sent the Revised December COI, which listed a "specified perils/collision deductible," only to the insurer, and not to Plaintiff. Likewise, the March COI, which related to the policy in force when the accident occurred, was sent only to Rush and not to Plaintiff.

The evidence, considered in the light most favorable to Plaintiff, is insufficient to create a disputed issue of fact regarding whether Plaintiff relied on Defendant's alleged misrepresentations. The only document Plaintiff received from Defendant provided no representation regarding the insurance coverage in dispute. Plaintiff argues that its rental of trucks from Rush shows reliance on the alleged misrepresentations, because Rush agreed to the short-term rentals on the condition that Plaintiff have collision coverage for those vehicles. This attenuated connection is insufficient to establish a factual dispute regarding Plaintiff's reliance.

Section 75-1.1 requires a showing of (1) actual reliance—that "the plaintiff . . . affirmatively incorporated the alleged misrepresentation into his or her decision-making process" and (2) that the reliance was reasonable. *Bumpers*, 367 N.C. at 90, 747 S.E.2d at 227. In this case, the evidence does not indicate such affirmative incorporation. At best, Plaintiff passively continued to engage in the deal it had made with Rush when the lack of collision coverage did not create a barrier. While Plaintiff argues that it relied on Defendant "to send Rush whatever they were requesting," and Plaintiff's representative testified that the fact that Rush "let the truck go" indicated it had received the COI, this is not enough to show that *Plaintiff* relied upon the information in the COI. At most, Plaintiff knew that Rush requested information regarding the collision deductibles, and then later rented the trucks to Plaintiff. *See*, *e.g.*, *Hospira Inc. v. Alphagary Corp.*, 194 N.C. App. 695, 701, 671 S.E.2d 7, 12 (2009) ("Under a theory of negligent misrepresentation, liability cannot be imposed when the plaintiff does not *directly* rely on information prepared by the defendant, but instead relies on altered information provided by a third party.").

Given that Plaintiff's representatives could have, at any time, examined the insurance policy and discovered that collision coverage was not provided for short-term rentals, any reliance on such attenuated information was unreasonable. "Reliance is not reasonable where the plaintiff could have discovered the truth of the matter through reasonable diligence, but failed to investigate." *Bumpers*, 367 N.C. at 90, 747 S.E.2d at 227. An insured's access to its policy does not always render reliance on an agent's misrepresentation of the terms of that policy unreasonable. *See*, *e.g.*, *Pearce*, 316 N.C. 461, 343 S.E.2d 174. But in cases of negligent misrepresentation we have held that, when terms are unambiguously expressed in the policy, reliance on misrepresentations as to those terms is unjustified. *Cobb v. Pennsylvania Life Ins. Co.*, 215 N.C. App. 268, 276, 715 S.E.2d 541, 549 (2011).

While UDTP and negligent misrepresentation claims are not identical, the facts of this case lead us to conclude that it was unreasonable for Plaintiff to rely on Rush's rental of trucks to conclude that those trucks were covered by the insurance policy procured by Defendant. Plaintiff is a sophisticated business, engaged in the business of trucking, and Plaintiff's representatives testified that no representative at any point read the policy it purchased through Defendant. Plaintiff's previous policy, provided to Defendant as a go-by, did not cover short-term rentals. A third party (Rush) requested confirmation of a policy term, and any misrepresentation of the term was communicated only to the

third party. These facts are distinguishable from cases like *Pearce*, in which the insured requested clarification of a policy and received a misrepresentation as to that term in response. In this case, Plaintiff's reliance on Rush's actions to determine the terms of its insurance contract was unreasonable.

In its reply brief, Plaintiff contends that, even if it did not directly rely on Defendant's misrepresentation, the reliance of a third party can show causation for a UDTP claim. In *Ellis v. Smith-Broadhurst, Inc.*, decided by this court before our Supreme Court's decision in *Bumpers*, an insurance agent sued a competitor for submitting a policy comparison to a potential client that misrepresented the plaintiff's policy. 48 N.C. App. 180, 268 S.E.2d 271 (1980). We held that, because there was some evidence that the client "continued to rely on the comparison made by defendants" in making its decision, there was a genuine issue of material fact as to proximate cause. 48 N.C. App. at 184, 268 S.E.2d at 274. *Ellis* is either directly in conflict with *Bumpers*, and therefore not binding, or distinguishable from this case.

The majority opinion in *Bumpers* is unequivocal in its language: "actual reliance requires that *the plaintiff* have affirmatively incorporated the alleged misrepresentation into his or her decision-making process." 367 N.C. at 90, 747 S.E.2d at 227 (emphasis added). "A plaintiff must prove that *he or she* detrimentally relied on the defendant's misrepresentation." *Id.* (citing *Hageman v. Twin City Chrysler-Plymouth Inc.*, 681 F.Supp. 303, 308 (M.D.N.C. 1988) (emphasis added)). It is clear from this case that only the direct reliance of the plaintiff is sufficient to support a UDTP claim based on misrepresentation. The holding in *Bumpers* precludes a UDTP claim such as that in *Ellis*, in which a third party's reliance caused damage to the plaintiff. Accordingly, Plaintiff cannot base a theory of causation on the reliance of another party.

This case is also factually distinguishable from *Ellis*. In *Ellis*, the defendant made a misrepresentation to a potential client that caused them to purchase its product over the plaintiff's. 48 N.C. App. at 181, 268 S.E.2d at 272. The unfair and deceptive practice at issue in *Ellis* was a misrepresentation that directly interfered with the plaintiff's business opportunity and caused the plaintiff harm. In this case, taking the evidence in the light most favorable to Plaintiff, Rush relied on the COI in deciding to rent trucks to Plaintiff on a short-term basis. However, simply renting the trucks to Plaintiff did not cause any harm. The harm arose only when an accident occurred, incurring losses that Plaintiff assumed were covered under its policy.

Because the evidence, considered in the light most favorable to Plaintiff, is insufficient to show that (1) Defendant made a misrepresentation to Plaintiff concerning insurance coverage; (2) Plaintiff relied on the representation; or (3) Plaintiff's attenuated reliance on a third party's reliance would be reasonable, the trial court did not err in allowing Defendant's motion for summary judgment as to UDTP. For these same reasons, Plaintiff's amended complaint cannot raise a genuine issue of material fact and is therefore futile. The trial court did not err in denying Plaintiff's motion to amend.

III. CONCLUSION

For the above reasons, we hold that the trial court did not err in allowing Defendant's motion for summary judgment and denying Plaintiff's motion to amend and motion for summary judgment.

AFFIRMED.

Judges STROUD and COLLINS concur.

FLORIAN HALILI, PLAINTIFF
v.
DENADA RAMNISHTA, DEFENDANT

No. COA19-869

Filed 1 September 2020

1. Child Custody and Support—jurisdiction—Uniform Child Custody and Jurisdiction Enforcement Act—child's home state

The trial court lacked subject matter jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) to make an initial custody determination as to the parties' minor daughter, where its unchallenged findings of fact established that the parties did not move from New York—where their daughter was born—to North Carolina until five months before the custody action commenced and, therefore, North Carolina was not the daughter's "home state" under UCCJEA (requiring six months for "home state" status). North Carolina did not become the daughter's home state when the family took a twelve-day vacation there six months before the action commenced.

2. Child Custody and Support—jurisdiction—relinquishment—inconvenient forum—Uniform Child Custody and Jurisdiction Enforcement Act

The trial court properly concluded that North Carolina was an inconvenient forum in which to determine custody for the parties' youngest child and, therefore, did not abuse its discretion by relinquishing its jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). When determining that New York (the parties' prior home) was a more appropriate forum, the trial court properly considered the relevant factors under the UCCJEA and, in doing so, did not err by considering circumstances as they existed after plaintiff filed the complaint. Further, the UCCJEA—unlike its statutory predecessor, the Uniform Child Custody Jurisdiction Act—did not require a specific finding that it was in the child's best interest for the court to relinquish jurisdiction.

3. Child Custody and Support—jurisdiction—Uniform Child Custody Jurisdiction and Enforcement Act—misapprehension of the law

The trial court did not act under a misapprehension of the law in concluding it lacked subject matter jurisdiction to adjudicate the parties' child custody case. Although the court initially concluded it had jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) to determine custody of the parties' youngest child, it relinquished its jurisdiction after determining that North Carolina was an inconvenient forum for this litigation. The court also correctly determined that it lacked jurisdiction as to the eldest child where North Carolina was not the child's "home state" for UCCJEA purposes.

Appeal by Plaintiff from Orders entered 9 August 2018 and 28 November 2018 by Judge Gary L. Henderson in Mecklenburg County District Court. Heard in the Court of Appeals 29 April 2020.

Manning, Fulton & Skinner, P.A., by Michael S. Harrell, for plaintiff-appellant.

Jonathan McGirt for defendant-appellee.

HAMPSON, Judge.

Factual and Procedural Background

Florian Halili (Plaintiff) appeals from (1) an Order granting a Motion to Dismiss (Dismissal Order) filed by Denada Ramnishta (Defendant) on the basis the trial court did not have subject-matter jurisdiction over this child-custody action under the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA)[1] and (2) an Order denying Plaintiff's Motion for a New Trial brought under Rule 59 of the North Carolina Rules of Civil Procedure (Rule 59 Order). At the heart of this case are the trial court's Conclusions in the Dismissal Order that (1) North Carolina was not the "home state" of the parties' oldest child, Opal,[2] and (2) although North Carolina was the "home state" of the parties' youngest child, Riley, North Carolina was an inconvenient forum for this litigation. The Record before us tends to show the following:

On 19 January 2018, Plaintiff, at the time acting pro se, filed a Complaint in Mecklenburg County District Court, seeking temporary and permanent custody of the minor children.[3] On 2 March 2018, Defendant filed her Motion to Dismiss in the current action, requesting the trial court dismiss Plaintiff's Complaint for lack of subject-matter jurisdiction. Defendant's Motion to Dismiss asserted the trial court lacked subject-matter jurisdiction under the UCCJEA because the state of New York was Opal's home state and North Carolina was an inconvenient forum in which to determine the issue of child custody for Riley.

The trial court held a hearing on Defendant's Motion to Dismiss on 28 June 2018, at which both parties presented evidence and arguments to the trial court. On 9 August 2018, the trial court entered its Dismissal Order.

In the Dismissal Order, the trial court made Findings of Fact that Plaintiff does not challenge on appeal. These Findings of Fact are thus binding on appeal. *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (holding unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal (citations omitted)). Therefore, these Findings form the operative facts of this case, including:

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1. As codified in North Carolina at N.C. Gen. Stat. § 50A-101 *et seq.* (2019).

2. In briefing, the parties refer to the children by their initials. We apply pseudonyms for the minor children for ease of reading.

3. Included in Plaintiff's prayer for relief in this custody action was a concomitant request for the trial court to set child support.

1. [Plaintiff] currently resides in Mecklenburg County, North Carolina, and [Defendant] currently resides in New York County, New York.

2. The parties were married to each other in August of 2007 in New York, and permanently physically separated on January 11, 2018.

3. There are two (2) children of the parties' marriage, namely, [Opal] . . . and [Riley] . . . .

4. [Opal] was born in New York State and [Riley] was born in Charlotte, North Carolina.

5. From July 11, 2011, and until August 17, 2017, the parties and [Opal] resided in New York County, New York. On August 17, 2017, the parties and [Opal] left New York and began residing in Charlotte, North Carolina on August 18, 2017. On January 11, 2018, [Defendant] and the minor children left Charlotte, North Carolina, and returned to their home in New York, New York.

6. It is undisputed the parties had the intent to permanently relocate from New York to North Carolina and that move would be for a period of time longer than one (1) year. [Defendant] intended at one point in time that the move to North Carolina would be approximately two (2) to three (3) years. [Plaintiff] intended at one point in time that the move to North Carolina would be approximately five (5) years.

7. As evidence of intent to move from New York to North Carolina, the parties listed their New York coop apartment for sale in June 2017. However, any sale would not occur earlier than three (3) months later due to the building application and approval process for the coop.

8. As evidence of intent to move from New York to North Carolina, in April 2017, the parties purchased a home in Charlotte, North Carolina, in addition to the existing condominium they own in Charlotte. The parties executed loan documents for this new home indicating that they would occupy the home within sixty (60) days following the purchase. However, the parties did not occupy the home within this time period.

9. As evidence of intent to move from New York to North Carolina, [Defendant] searched for, and accepted, a job offer on April 1, 2017 in Charlotte, but the record is clear that the parties did not move to Charlotte at this time.

10. As evidence of intent to move from New York to North Carolina, in January 2017, [Defendant] applied for a school in Charlotte for [Opal] to attend beginning August 2017.

11. The parties moved to North Carolina from New York, with the intent to move, on August 17, 2017. This date is supported by many facts, including:

a. The parties' actions to make the New York apartment unhabitable by returning the cable television box on August 17, 2017, and forwarding the New York mail to Charlotte on September 1, 2017.

b. Text communications from [Defendant] to an individual on August 21, 2017, indicating she moved to Charlotte, North Carolina, the preceding weekend.

c. The parties and [Opal] ([Riley] having not yet been born) packing up their New York registered car with items necessary to live in North Carolina and driving to Charlotte and arriving on August 18, 2017. These items included [Plaintiff's] wine collection and the parties' safe that contained numerous important documents.

d. Numerous pictures of [Opal] in the New York apartment on August 17, 2017, saying goodbye to the New York home.

e. The Charlotte home was professionally cleaned immediately prior to the parties and [Opal] arriving in Charlotte on August 18, 2017. Additionally, a washer and dryer had been installed and available for use in the Charlotte home prior to the family['s] arrival.

12. The parties and [Opal] ([Riley] having not yet been born), visited Charlotte, North Carolina for a vacation from June 28, 2017 until July 9, 2017, when they flew

via airplane roundtrip from New York. During this vacation, the parties stayed in a hotel for the first three (3) nights of their trip and then stayed for the remainder at their unfurnished home in Charlotte. The hotel had Internet access for [Defendant] to work and a pool for [Opal] to swim, which was part of the reason for choosing this hotel. The decision to vacate the hotel was made by [Plaintiff] and not [Defendant], who was approximately six (6) month's pregnant at the time. [Defendant's] testimony was more credible as to why the parties and the minor children spent the remainder of this visit at their unfurnished home. The Charlotte home was not habitable at this time. This home was dirty from construction, did not have necessary living items, including, but not limited to, utensils, furniture, washer and dryer, cable or Internet service.

13. During the visit to Charlotte, North Carolina from June 28, 2017 until July 9, 2017, [Defendant] met with potential doctors to assist in the delivery of [Riley] in September 2017. On June 29, 2017, [Defendant] sent a text message to a friend stating that, ". . . We are in clt till 7/8. I am working out of here so I can meet with some doctors and visit the two hospitals."

14. [Opal] resided in North Carolina from August 18, 2017 until January 11, 2018. [Opal] did not reside in North Carolina for six (6) months preceding the filing of [Plaintiff's] Complaint.

15. Between January 8th, 2018 and January 19th, 2018, the parties were in substantial marital conflict such that [Defendant] chose to move back to their New York apartment with the minor children on January 11th, 2018. The subject and actions of the parties during this marital conflict is before the New York County Family Court for permanent adjudication[.]

. . . .

21. There is also a pending New York Supreme Court action, filed by [Defendant] . . . for the following relief: absolute divorce, child custody, child support, maintenance, an equitable distribution of marital property . . . and related relief.

In its Dismissal Order, the trial court concluded it lacked subject-matter jurisdiction under the UCCJEA to make an initial custody decision regarding Opal because North Carolina was not Opal's home state. The trial court concluded North Carolina was Riley's home state, but North Carolina was an inconvenient forum and New York was a more convenient forum, thereby relinquishing its jurisdiction over Riley. Having made these Conclusions, the trial court finally concluded it "lacks subject matter jurisdiction to adjudicate the issue of child custody regarding the minor children."

On 20 August 2018, Plaintiff filed a Motion for a New Trial requesting the trial court grant Plaintiff a new trial. The trial court held a hearing on Plaintiff's Rule 59 Motion on 22 October 2018. On 28 November 2018, the trial court entered its Rule 59 Order denying Plaintiff's Motion for a New Trial. Plaintiff filed Notice of Appeal from both the Dismissal Order and Rule 59 Order on 2 January 2019.

Appellate Jurisdiction

Before addressing subject-matter jurisdiction under the UCCJEA, we must resolve an issue of appellate jurisdiction. Defendant has filed a Motion to Dismiss Appeal and Motion for Appellate Sanctions contending Plaintiff's Notice of Appeal was untimely filed five days late—thereby depriving this Court of jurisdiction over the appeal under N.C.R. App. P. 3(c)(1). Plaintiff counters Defendant's delayed and/or defective service of the trial court's Rule 59 Order tolled the time for filing Notice of Appeal and, as such, his appeal was timely noticed.[4]

We acknowledge the parties appear to have spared no effort in their vigorous litigation (and re-litigation) of this issue both in the trial court and in this Court (both in motions and in briefs). We, however, decline to wade into the factual and credibility determinations necessary to conclusively vindicate either party on this particular procedural dispute. Rather, Plaintiff has also filed a Petition for Writ of Certiorari with our Court, seeking review of the trial court's Orders in the event we conclude Plaintiff's Notice of Appeal was untimely. Presuming *arguendo* Plaintiff's Notice of Appeal was untimely having been filed more than thirty days after entry of the trial court's Rule 59 Order, in our discretion, we grant Plaintiff's Petition for Writ of Certiorari. N.C.R. App. P.

4. On 6 January 2020, Plaintiff filed with this Court a Motion to Tax Costs and Have Other Penalties Imposed Against Appellee (Motion to Tax Costs). Both parties' Motions seek to impose either sanctions or tax costs against the other party. In our discretion, we deny both Plaintiff's Motion to Tax Costs and Defendant's Motion for Appellate Sanctions. *See* N.C.R. App. P. 25(b); 34(b).

21(a)(1); *see also Anderson v. Hollifield*, 345 N.C. 480, 482, 480 S.E.2d 661, 663 (1997) ("Rule 21(a)(1) gives an appellate court the authority to review the merits of an appeal by certiorari even if the party has failed to file notice of appeal in a timely manner."). Because we grant Plaintiff's Petition for Writ of Certiorari, we dismiss as moot Defendant's Motion to Dismiss Appeal.

Issues

The dispositive issues in this case are whether (I) the trial court erred by concluding North Carolina was not Opal's home state under the UCCJEA; (II) the trial court erred by declining to exercise jurisdiction over Riley after concluding North Carolina was an inconvenient forum; and (III) the trial court acted under a misapprehension of the law in concluding it lacked subject-matter jurisdiction to adjudicate the issue of child custody regarding the minor children.

Analysis

I. Home-State Determination

[1] Plaintiff first contends the trial court erred by concluding it lacked subject-matter jurisdiction over Opal pursuant to the UCCJEA on the basis North Carolina was not Opal's home state.

A. Standard of Review

As noted above, Plaintiff does not challenge the trial court's Findings of Fact, rather narrowing his focus on the question of whether those Findings support the trial court's Conclusion it had no jurisdiction under the UCCJEA as it related to Opal. "Whether the trial court has jurisdiction under the UCCJEA is a question of law[.]" *In re J.H.*, 244 N.C. App. 255, 260, 780 S.E.2d 228, 233 (2015) (citation omitted). Accordingly, we review the trial court's conclusions de novo. *See Gerhauser v. Van Bourgondien*, 238 N.C. App. 275, 281, 767 S.E.2d 378, 383 (2014) (citations omitted).

B. Discussion

A North Carolina court has jurisdiction to make an initial child-custody determination under the UCCJEA if North Carolina was

> the home state of the child on the date of the commencement of the proceeding, *or was the home state of the child within six months before the commencement of the proceeding, and the child is absent from this State but a parent or person acting as a parent continues to live in this State*[.]

N.C. Gen. Stat. § 50A-201(a)(1) (2019) (emphasis added). A child's "home state" is

> the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.

Id. § 50A-102(7) (2019). Section 50A-102(5) defines "commencement" for UCCJEA purposes as "the filing of the first pleading in a proceeding." *Id.* § 50A-102(5).

Here, the trial court found:

> 5. From July 11, 2011, and until August 17, 2017, the parties and [Opal] resided in New York County, New York. On August 17, 2017, the parties and [Opal] left New York and began residing in Charlotte, North Carolina on August 18, 2017. On January 11, 2018, [Defendant] and the minor children left Charlotte, North Carolina, and returned to their home in New York, New York.
>
> . . . .
>
> 12. The parties and [Opal] ([Riley] having not yet been born), visited Charlotte, North Carolina for a vacation from June 28, 2017 until July 9, 2017, when they flew via airplane roundtrip from New York. During this vacation, the parties stayed in a hotel for the first three (3) nights of their trip and then stayed for the remainder at their unfurnished home in Charlotte. The hotel had Internet access for [Defendant] to work and a pool for [Opal] to swim, which was part of the reason for choosing this hotel. The decision to vacate the hotel was made by [Plaintiff] and not [Defendant], who was approximately six (6) month's pregnant at the time. [Defendant's] testimony was more credible as to why the parties and the minor children spent the remainder of this visit at their unfurnished home. The Charlotte home was not habitable at this time. This home was dirty from construction,

> did not have necessary living items, including, but not limited to, utensils, furniture, washer and dryer, cable or Internet service.
>
> . . . .
>
> 14. [Opal] resided in North Carolina from August 18, 2017 until January 11, 2018. [Opal] did not reside in North Carolina for six (6) months preceding the filing of [Plaintiff's] Complaint.

Plaintiff argues the trial court erred as a matter of law by grounding its Conclusion North Carolina was not Opal's home state on a Finding Opal did not "reside" in North Carolina for six months preceding the filing of Plaintiff's Complaint. Specifically, Plaintiff asserts the trial court incorrectly conflated "residency" with the statutorily required inquiry as to where Opal "lived" with her parents for the preceding six months. *Id.* § 50A-102(7). Rather, Plaintiff contends the relevant inquiry for UCCJEA purposes is simply whether the child was "physically present" with a parent in the state for the six months preceding the action.[5]

We need not decide in this case, however, whether Plaintiff's definitional argument is correct or not. This is so because the trial court was using its Findings as to residency not to define jurisdiction under the UCCJEA but to resolve the critical *factual* dispute between the parties central to the issue—when did the parties actually begin living in North Carolina. Plaintiff's contention is that the parties began living in North Carolina on 28 June 2017 and that the parties' return to New York from 9 July 2017 until 18 August 2017 was merely a "temporary absence" from North Carolina that does not count against the relevant six-month period. *See* N.C. Gen. Stat. § 50A-102(7). Conversely, Defendant contends the parties actually continued to live in New York until 18 August 2017 and that the parties' visit to North Carolina from 28 June 2017 until 9 July 2017 was merely a vacation—and thus a

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5. While North Carolina has apparently not decided this question, Plaintiff aptly cites caselaw from a number of other jurisdictions in support of his position. *See*, *e.g.*, *In re M.S.*, 205 Vt. 429, 436, 176 A.3d 1124, 1130 (2017) ("We join several other states in holding that it is the child's physical presence—not a parent or child's residence, domicile or subjective intent—that is relevant to determining a child's home state." (footnote and citations omitted)); *Slay v. Calhoun*, 332 Ga. Ct. App. 335, 340-41, 772 S.E.2d 425, 429-30 (2015) (concluding the language "lived" in definition of home state refers to the state where the child is physically present, not state of legal residence (citations omitted)); *In re Tieri*, 283 S.W.3d 889, 893 (Tex. Ct. App. 2008) ("In determining where a child lived for the purposes of establishing home state jurisdiction, the trial court must consider the child's physical presence in a state and decline to determine where a child lived based on the child's or the parents' intent." (citation omitted)).

temporary absence from New York. As such, Defendant argues the date the child began "living with" the parties in North Carolina was not until 18 August 2017 and therefore North Carolina had not attained home-state status when Opal returned to New York in January 2018 just prior to the commencement of this action.

As is evident from the trial court's unchallenged Findings, the trial court agreed with Defendant's view of the facts. The trial court was looking to "residence"—in addition to a number of other facts contained in its Findings—as part of the totality of the circumstances to determine whether the parties' visit to North Carolina beginning 28 June 2018 was a temporary absence from New York or whether the parties' return to New York from 9 July 2018 to 18 August 2018 was a temporary absence from North Carolina. *See Chick v. Chick*, 164 N.C. App. 444, 449, 596 S.E.2d 303, 308 (2004) ("adopting a totality of the circumstances approach to determine whether the absence [from a state] was merely a temporary absence" (citation omitted)). The trial court's determination the 28 June 2018 visit to North Carolina was a "vacation" and therefore the parties had not moved to North Carolina during this period is exactly the type of factual dispute best left to the trial court and one in which we cannot second guess as an appellate court. *See In re J.A.M.*, 372 N.C. 1, 11, 822 S.E.2d 693, 700 (2019) ("But an important aspect of the trial court's role as a finder of fact is assessing the demeanor and credibility of witnesses, often in light of inconsistencies or contradictory evidence. It is in part because *the trial court is uniquely situated to make this credibility determination* that appellate courts may not reweigh the underlying evidence presented at trial." (emphasis added)).[6] Because the trial court's binding Findings establish Opal did not live in North Carolina for six consecutive months prior to, or within six months prior to, the filing of Plaintiff's Complaint, the trial court properly concluded North Carolina did not have home-state jurisdiction over Opal under the UCCJEA.

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6. Consider the following example—the Smiths have lived in North Carolina with their four-year-old child since their child's birth. The Smiths then decide to take a one-week vacation to Hawaii. During this vacation, the Smiths decide they would like to move permanently to Hawaii. Upon returning to North Carolina, they begin preparing to move, and three months later, the Smiths in fact move to Hawaii. Under Plaintiff's view, the Smiths' one-week vacation, and the subsequent three-month period they spent in North Carolina preparing to move to Hawaii, would be considered a time period that the Smiths had "lived" in Hawaii for purposes of a home-state determination, regardless of the Smiths' intent. Such a result is contrary to how our courts have typically analyzed where a family resides under the UCCJEA. *See Chick*, 164 N.C. App. at 449, 596 S.E.2d at 308 ("adopting a totality of the circumstances approach to determine whether the absence [from a state] was merely a temporary absence" (citation omitted)).

II. Inconvenient-Forum Determination

[2] Plaintiff next argues the trial court erred by declining to exercise jurisdiction over Riley after determining North Carolina was an inconvenient forum and that New York was a more appropriate forum. First, Plaintiff contends the trial court erred by considering a variety of factors occurring after the filing of Plaintiff's Complaint. Second, Plaintiff asserts the trial court erred by failing to find it was in the children's best interests for North Carolina to decline jurisdiction.

A. Standard of Review

We review a trial court's decision to decline to exercise jurisdiction in favor of another forum for an abuse of discretion. *In re M.M.*, 230 N.C. App. 225, 228, 750 S.E.2d 50, 52-53 (2013) (citation omitted). Where the trial court "determines that the current forum is inconvenient, [it] must make sufficient findings of fact to demonstrate that it properly considered the relevant factors listed in N.C. Gen. Stat. § 50A-207(b)." *Id.* at 228-29, 750 S.E.2d at 53 (citation omitted). "We review the trial court's findings of fact to determine whether there is any evidence to support them." *Velasquez v. Ralls*, 192 N.C. App. 505, 506, 665 S.E.2d 825, 826 (2008) (citation omitted).

B. Discussion

Pursuant to N.C. Gen. Stat. § 50A-207(a), a North Carolina court that has jurisdiction under the UCCJEA to make a child-custody determination may "decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances, and that a court of another state is a more appropriate forum." N.C. Gen. Stat. § 50A-207(a) (2019). Before determining whether North Carolina is an inconvenient forum, the trial court must "consider whether it is appropriate for a court of another state to exercise jurisdiction." *Id.* § 50A-207(b). In making this determination, the trial court "shall allow the parties to submit information and shall consider all relevant factors," including but not limited to:

> (1) Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;
>
> (2) The length of time the child has resided outside this State;
>
> (3) The distance between the court in this State and the court in the state that would assume jurisdiction;

(4) The relevant financial circumstances of the parties;

(5) Any agreement of the parties as to which state should assume jurisdiction;

(6) The nature and location of the evidence required to resolve the pending litigation, including testimony of the child;

(7) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and

(8) The familiarity of the court of each state with the facts and issues in the pending litigation.

Id. § 50A-207(b)(1)-(8).

In its Dismissal Order, the trial court made the following Findings of Fact regarding Section 50A-207(b)'s factors:

> a. With respect to [Section] 50A-207(b)(1), while no conclusive evidence was offered, the evidence presented supports that there may have been domestic violence by [Plaintiff] against [Defendant] and/or the minor child [Opal]. In March 2018, [Opal] began Trauma Focused Cognitive Behavioral Therapy in New York at Spence-Chapin Services to Families & Children, which continued in April and was interrupted for approximately six (6) weeks. Pursuant to a Stipulation entered May 18, 2018, and signed by the parties, their New York attorneys, and Judge Douglas E. Hoffman of the New York Supreme Court, [Opal] was re-enrolled and is currently receiving Trauma Focused Cognitive Behavioral Therapy. Additionally, there are numerous domestic violence proceedings pending in New York.
>
> b. With respect to [Section] 50A-207(b)(2), as of June 28, 2018, the minor children have been residing in New York for five (5) months, and [Riley] resided in North Carolina for slightly less than four (4) months, and [Opal] resided in North Carolina for five (5) months, before moving to New York on January 11, 2018. As it relates to [Riley], and as of June 28, 2018, he has spent more time in New York than he has in North Carolina during his lifetime.

> c. With respect to [Section] 50A-207(b)(3) and (4), the distance between New York and North Carolina is not a slight distance, but [Plaintiff] can better bear the cost of travel between these two (2) states as his income is substantially greater than [Defendant's].
>
> d. With respect to [Section] 50A-207(b)(5), the Court considered this factor and it does not apply to this case.
>
> e. With respect to [Section] 50A-207(b)(6), there is greater evidence in New York than there is in North Carolina as it relates to [Opal]. There is at least one (1) full year of her being in school in New York as opposed to roughly four (4) months in North Carolina from late August to December 2017, so there are likely more teachers, school providers, and more people who have been involved in [Opal's] life that provide evidence to the court in New York rather than in North Carolina. Additionally, from a medical standpoint, there is a longer history in New York as opposed to, at best, six (6) months in North Carolina. In terms of family and friends, [Plaintiff's] parents reside in North Carolina, and [Defendant's] parents do not reside in the United States. However, there are numerous friends, coworkers, and more people to provide testimony and evidence in New York as opposed to North Carolina.
>
> f. With respect to [Section] 50A-207(b)(7), New York and North Carolina have equal ability to expeditiously decide the issue of child custody.
>
> g. With respect to [Section] 50A-207(b)(8), New York and North Carolina have equal familiarity with the facts and issues in the pending litigation.

Based on these Findings, the trial court determined North Carolina was an inconvenient forum and New York was a more convenient forum; therefore, the trial court relinquished jurisdiction as it related to Riley.

Plaintiff, again, does not challenge the trial court's Findings of Fact regarding its inconvenient-forum determination; accordingly, these Findings are binding on appeal. *See Koufman*, 330 N.C. at 97, 408 S.E.2d at 731 (citations omitted). Instead, Plaintiff first contends the trial court erred by considering "post-filing activities and factors" and the trial court should have instead limited its inconvenient-forum inquiry to

whether North Carolina was an inconvenient forum at the time of *filing* Plaintiff's Complaint.

A review of Section 50A-207, however, belies Plaintiff's argument. First, Section 50A-207(a) provides a trial court "may decline to exercise its jurisdiction *at any time* if it determines that it is an inconvenient forum under the circumstances[.]" N.C. Gen. Stat. § 50A-207(a) (emphasis added). Where this Statute allows the trial court to decline exercising jurisdiction "at any time[,]" it necessarily follows the trial court is not limited to considering whether North Carolina is an inconvenient forum *only* at the time of a plaintiff filing its complaint, but rather the trial court may consider whether it is an inconvenient forum "under the circumstances" as they exist *after* the filing of a complaint. *Id.* Further, in making this determination, the trial court "shall consider all relevant factors" listed in Section 50A-207(b). *Id.* § 50A-207(b). This Statute's factors, however, are not confined only to the circumstances as they existed at the filing of a plaintiff's complaint but necessarily contemplate post-filing circumstances as well, such as "[t]he relative financial circumstances of the parties[.]" *Id.* § 50A-207(b)(4). Accordingly, the trial court did not err by considering post-filing activities in its inconvenient-forum determination.

Plaintiff next argues the trial court erred in its inconvenient-forum determination because the trial court failed to find it was in the children's best interests for North Carolina to decline jurisdiction. In support of his argument, Plaintiff cites our Court's decision in *Kelly v. Kelly*, which held—"*Without a showing that the best interest of the child would be served if another state assumed jurisdiction*, North Carolina courts should not defer jurisdiction pursuant to [N.C. Gen. Stat. §] 50A-7." 77 N.C. App. 632, 635, 335 S.E.2d 780, 783 (1985) (emphasis added). We disagree.

In *Kelly*, our Court considered whether a trial court erred in its inconvenient-forum determination under the UCCJEA's statutory predecessor—the Uniform Child Custody Jurisdiction Act (UCCJA). *See id.* at 634-35, 335 S.E.2d at 782 (citation omitted); *see also* 1979 N.C. Sess. Law 110 (N.C. 1979) (enacting the UCCJA); 1999 N.C. Sess. Law 223 (N.C. 1999) (codified at N.C. Gen. Stat. § 50A-101 *et seq.*) (repealing the UCCJA and enacting the UCCJEA). Both the UCCJA and UCCJEA contained analogous inconvenient-forum provisions that required trial courts to consider certain factors in determining whether North Carolina is an inconvenient forum. *See* 1979 N.C. Sess. Law 110, § 1 (then-codified at N.C. Gen. Stat. § 50A-7); N.C. Gen. Stat. § 50A-207.

Relevant to this appeal, the UCCJA provided: "In determining if it is an inconvenient forum, the court shall consider if it is in the *interest* of the child that another state assume jurisdiction." 1979 N.C. Sess. Law 110, § 1 (emphasis added) (then-codified at N.C. Gen. Stat. § 50A-7(c)). Under the UCCJEA, however, a trial court must "consider whether it is *appropriate* for a court of another state to exercise jurisdiction" before determining whether it is an inconvenient forum. N.C. Gen. Stat. § 50A-207(b) (emphasis added). Further, the UCCJEA did not retain any of the UCCJA's language requiring a trial court to consider the interests of the child in its inconvenient-forum analysis. *See id.* Therefore, *Kelly*'s holding that a trial court should not defer jurisdiction under the UCCJA without a showing that it would be in the best interest of the child has no application under the current UCCJEA. Accordingly, the trial court did not err by not including a finding that relinquishing jurisdiction over Riley was in the child's best interest.

Furthermore, the trial court's detailed Findings of Fact, which Plaintiff does not challenge on appeal, illustrate it considered the relevant factors under Section 50A-207 based on the evidence the parties chose to submit to the trial court, and these Findings of Fact support the trial court's ultimate Conclusion relinquishing jurisdiction over Riley because North Carolina was an inconvenient forum. *See In re M.M.*, 230 N.C. App. at 228-29, 750 S.E.2d at 52-53 (citations omitted). Therefore, the trial court did not abuse its discretion. *See id.* (citations omitted).

III. Lack of Jurisdiction

[3] Plaintiff lastly argues the trial court erred in its Conclusion of Law 6, which provides: "This Court lacks subject matter jurisdiction to adjudicate the issue of child custody regarding the minor children." Plaintiff contends this Conclusion is "flatly wrong" because the trial court had already determined North Carolina was Riley's home state and thus that North Carolina had subject-matter jurisdiction to adjudicate the issue of child custody. *See* N.C. Gen. Stat. § 50A-201(a)(1). Accordingly, Plaintiff asserts the trial court acted under a "misapprehension of law" and therefore "the trial court's decisions finding New York a more convenient forum and declining to grant [Plaintiff] a new trial constitute abuses of the trial court's discretion[.]"

As Defendant correctly points out, however, Plaintiff's argument "puts the cart before the horse." In its Dismissal Order, the trial court made the following Conclusions of Law:

> 1. The Court has jurisdiction to adjudicate [Defendant's] Motion to Dismiss.

2. Pursuant to [N.C. Gen. Stat. §] 50A-102, North Carolina is not [Opal's] home state for the purpose of exercising jurisdiction to make an initial custody determination pursuant to [N.C. Gen. Stat. §] 50A-102.

3. Pursuant to [N.C. Gen. Stat. §] 50A-102(7), North Carolina is [Riley's] home state.

4. Pursuant to [N.C. Gen. Stat. §] 50A-201(a)(1), North Carolina has jurisdiction to make an initial child custody determination regarding [Riley].

5. However, pursuant to [N.C. Gen. Stat. §] 50A-207, North Carolina is an inconvenient forum under the circumstances regarding [Riley] and New York is a more convenient forum to exercise jurisdiction and make a child custody determination regarding [Riley].

6. This Court lacks subject matter jurisdiction to adjudicate the issue of child custody regarding the minor children.

7. [Defendant's] Motion to Dismiss should be granted as a matter of law.

As the trial court's Conclusions make clear, the trial court first determined it did not have subject-matter jurisdiction over Opal because North Carolina was not her home state. *See id*. Regarding Riley, the trial court then concluded it did have jurisdiction over Riley but *declined* to exercise its jurisdiction after concluding North Carolina was an inconvenient forum. Indeed, in its Decretal Section, the trial court expressly stated, "North Carolina *relinquishes* jurisdiction over [Riley]." (emphasis added). Thus, Conclusion of Law 6 simply recognizes the trial court no longer had jurisdiction because it had already determined North Carolina did not have jurisdiction over Opal and relinquished its jurisdiction over Riley. Accordingly, the trial court did not act under a misapprehension of the law and did not err in dismissing Plaintiff's Complaint for lack of subject-matter jurisdiction.

Conclusion

Accordingly, for the foregoing reasons, we affirm the trial court's Dismissal Order and Rule 59 Order.

AFFIRMED.

Judges DILLON and BERGER concur.

HOLLAND v. FRENCH

[273 N.C. App. 252 (2020)]

DONNIE GEORGE HOLLAND, EXECUTOR OF THE ESTATE OF SHIRLEY DAVIS PENDERGRASS, PLAINTIFF
v.
RICHARD ALLAN FRENCH AND NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, DEFENDANTS

No. COA19-498

Filed 1 September 2020

Evidence—subsequent remedial measures—impeachment—relevance—probative value—limiting instruction

In a wrongful death action arising from a car crash, which included a claim against the Department of Transportation (DOT) for negligent installation of a stop sign at the crash site, a traffic engineer's written recommendation in a post-accident report that the stop sign be relocated was admissible under the impeachment exception to Evidence Rule 407 (excluding evidence of subsequent remedial measures). The report was relevant evidence contradicting the engineer's testimony that the sign was sufficiently visible in its current placement, and the report's probative value was not substantially outweighed by the danger of unfair prejudice. Further, the trial court did not err by failing to issue a limiting instruction as to the report where DOT failed to request that instruction pursuant to Rule 105.

Judge DILLON concurring in result with separate opinion.

Judge TYSON concurring in part and dissenting in part.

Appeal by Defendant North Carolina Department of Transportation from order entered 18 October 2018 and from judgment entered 11 December 2018 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 8 January 2020.

W. Earl Taylor, Jr. for plaintiff-appellee.

Attorney General Joshua H. Stein, by Special Deputy Attorneys General Alesia M. Balshakova, Joseph Finarelli, and Alexander G. Walton, for the State.

MURPHY, Judge.

A professional recommendation concerning a stop sign's placement made in a post-accident report was a subsequent remedial measure typically excluded from evidence under Rule 407. That professional recommendation was appropriately used as impeachment evidence when it was properly admitted under the impeachment exception of Rule 407 and when it was relevant for impeachment under Rule 401. The professional recommendation was relevant evidence for impeachment purposes when it contradicted the witness's perception, memory, or narration, or the veracity of the witness's testimony, on direct examination.

The trial court did not abuse its discretion in concluding the probative value of the professional recommendation was not substantially outweighed by the danger of unfair prejudice when the professional recommendation was highly probative, was prepared by the witness, and was used to contradict the witness on cross-examination.

When the party that called the witness to testify fails to request a limiting instruction in accordance with Rule 105 concerning the witness's recommendation, another party may make arguments concerning that evidence upon its proper admission.

BACKGROUND

On 4 April 2016, Ms. Shirley Pendergrass ("Decedent") and Richard French ("French") were involved in a motor vehicle crash at the intersection of Castalia Road and Red Road in Nash County. Decedent was driving on Castalia Road in an easterly direction, while French was driving on Red Road in a northerly direction. A stop sign required drivers approaching the intersection in a northerly direction on Red Road to stop and yield to drivers on Castalia Road. Decedent and French arrived at the intersection at the same time, and despite the stop sign, French failed to stop and yield the right of way. The two vehicles collided, and Decedent sustained fatal injuries.

French was charged with the following: misdemeanor death by motor vehicle; failing to stop for a stop sign; and failing to yield the right of way. On 5 August 2016, French pleaded guilty to misdemeanor reckless driving to endanger.

On 31 May 2016, Decedent's Executor, Donnie George Holland ("Plaintiff"), sued French and his wife, who owned the vehicle French was driving, for wrongful death. French's wife was later granted a dismissal from the case. Plaintiff alleged French's failure to stop at the duly erected stop sign at the intersection of State Road 1425 ("Castalia Road") and State Road 1417 ("SR 1417" or "Red Road") in Nash County caused

the crash. Plaintiff amended the Complaint to add the North Carolina Department of Transportation ("NCDOT") as a Third-Party Defendant for negligent installation and maintenance of traffic control devices on Red Road.

NCDOT filed a motion in limine seeking to exclude any reference to or any evidence of subsequent remedial measures pursuant to North Carolina Rule of Evidence 407, including "recommendations for subsequent remedial measures." The trial court ruled that Plaintiff was "prohibited from mentioning [subsequent remedial measures] during jury selection or [the] case in chief," but reserved the issue for decision if the "matter [became] a direct issue" upon NCDOT's presentation of evidence.

At trial, NCDOT called Christopher Lewis ("Lewis"), an Assistant Division Traffic Engineer, about the placement of the stop sign. Lewis had visited the intersection where the crash occurred in December 2014, and again to make a 2016 post-accident report.[1] In portions of direct examination, Lewis testified as follows:

> [NCDOT]: And did you go to the intersection [in 2014] to look at the signage there?
>
> [Lewis]: I did.
>
> [NCDOT]: And what signage did you observe at the time?
>
> [Lewis]: . . . What I found was a typical intersection that you would find in a rural part of a county. . . . So, I didn't see an issue safety-wise when I went to the location. . . . [T]here wasn't a sight distance issue to the primary stop sign on the right-hand side.
>
> . . .
>
> [NCDOT]: . . . [In 2014, d]id you determine if there was any visibility issue with the right-hand stop sign?
>
> [Lewis]: I did not see any.
>
> [NCDOT]: And, therefore, you -- you did not make a decision to put any additional signage?
>
> [Lewis]: No, it -- it wasn't necessary. . . . That - - that's my job is to make sure that when I leave something,

1. This post-accident report was Exhibit 37 at trial.

I leave it -- leave it in a safe manner. And I even for a minute questioned whether there was [a] visibility issue . . . . I would have instructed the sign erector while you're here go ahead and add a stop ahead sign.

[NCDOT]: So, you would not have instructed him?

[Lewis]: I mean, if -- if there were --

[NCDOT]: Oh.

[Lewis]: -- a visibility issue, I would have instructed him to do so, but *in this case there wasn't.*

. . .

[Lewis]: So, getting back to the stop sign, we want to put the stop sign in a location where you can see it from a distance off. We want to give you as much time as you can to perceive what it is and to be able to safely come to a stop. And when I looked at this intersection in 2014, maintenance-wise with a supplemental stop sign, that's great that it's there. I saw no reason to -- to take it out and having that it's been there and I have no history of it, my primary concern is that stop sign on the right-hand side. And -- and I left there feeling that it was safe based on the engineering judgment.

. . .

[NCDOT]: You've – you've heard the testimony by Mr. Marceau and the other experts with respect to their opinions about application of [the Manual on Uniform Traffic Control Devices]. Do you have any reasons to disagree with their opinions?

[Lewis]: . . . And when I went to t[h]is location in 2014 prior to the accident, I left there with the impression that this is safe. I can see this stop sign. . . . So, do I disagree with what's been – what's been said? I can't think of anything I disagree with. . . .

[NCDOT]: But I mean, they opined the intersection ahead sign should have been placed and the supplemental sign should have been protected. I mean, do you agree with that?

[Lewis]: Could you say that again?

[NCDOT]: Yes. They opined that the stop ahead sign should have been placed.

[Lewis]: Again, I don't know the history behind it, so it's difficult for me to say what the reasons were for it being there to begin with.

[NCDOT]: No, I mean, the stop ahead sign. They say that it should have been placed by NCDOT, the experts –

[Lewis]: The stop – the stop ahead sign?

[NCDOT]: Correct.

[Lewis]: I'm sorry. I thought you were referring to supplemental.

[NCDOT]: Yeah.

[Lewis]: *The stop ahead sign, no, it -- it doesn't – it's not necessary for it to be placed because the visibility is to that primary stop sign.* I have -- you know, but the time I saw the intersection, I had no reason to – to add it.

. . .

[NCDOT]: They also opined about NCDOT -- they opined about the placement of the right-hand stop sign. That it – the way it was placed it was closer to the woods, not as close to Red – Red Road and *that created the visibility conspicuity issue.* Do you agree with that?

[Lewis]: *No.*

(Emphasis added).

When direct examination of Lewis concluded, Plaintiff requested, out of the presence of the jury, to be allowed to question Lewis with respect to Exhibit 37, which comported with the trial court's ruling

regarding subsequent remedial measures evidence. Lewis prepared Exhibit 37 after the accident, and the report stated that the stop sign was "too far out" and needed to be "move[d] in closer" to the road "for better sight distance." Plaintiff sought to use that report to impeach Lewis's testimony on direct examination. After hearing arguments on the issue, the trial court allowed Plaintiff to proceed with cross-examination of Lewis, and to use Exhibit 37 in doing so, while noting and overruling NCDOT's standing objection.

On cross-examination, Lewis further testified as follows:

> [Plaintiff]: How many times did you tell this jury that there was nothing wrong with that stop sign to the right?
>
> [Lewis]: More than once.
>
> [Plaintiff]: How many times did you estimate you told the jury there was nothing wrong with that stop sign to the right?
>
> [Lewis]: I don't recall how many times.
>
> [Plaintiff]: I had seven or eight. Is that about right?
>
> [Lewis]: I - - I don't recall. I would say that's fair.
>
> [Plaintiff]: How many times did you tell this jury there's not [a] visibility issue with that stop sign on the right?
>
> [Lewis]: Several times.
>
> [Plaintiff]: How many times did you tell that jury that you didn't see any reason that he didn't [see] that sign?
>
> [Lewis]: I don't know what the circumstances were in this crash. I could not find a reason, you know, why he wouldn't have seen the sign.
>
> [Plaintiff]: How many times did you tell the jury there was no sight distance issue in this case?
>
> [Lewis]: Several times.

Plaintiff then questioned Lewis regarding Exhibit 37. Lewis acknowledged Exhibit 37 referred to the stop sign at issue, he made the handwritten notations on Exhibit 37, and those notations were made

after he went to the scene of the accident. According to Lewis, he wrote the following on Exhibit 37: "northbound stop sign too far out [on Red Road]"[2] (the commonly used name for the road); an underlined "Yes!" next to that first opinion; and "move in closer to State Road 1417 for better sight distance." In addition, Lewis testified he believed the stop sign was "too far out to the right." Lewis also acknowledged he knew about the handwritten notations on Exhibit 37 when he testified during his direct examination testimony.

The jury found both French and NCDOT negligent and awarded Plaintiff $800,000.00 in damages. NCDOT timely appeals.

ANALYSIS

On appeal, NCDOT argues the trial court erred in admitting Exhibit 37 into evidence, and that Plaintiff's use of the exhibit in enlarged, poster form was misleading and prejudicial. Exhibit 37 is Lewis's 2016 post-accident report, which contains hand-written notations stating the stop sign was "too far out [on Red Road]" and should be "move[d] in closer to [Red Road] for better sight distance[.]" To support its argument of erroneous admission of the report, NCDOT argues (1) Exhibit 37 was inadmissible evidence of subsequent remedial measures pursuant to Rule 407 of the Rules of Evidence, and (2) the probative value of Exhibit 37, which the trial court admitted for impeachment, was substantially outweighed by the danger of unfair prejudice pursuant to Rule 403 of the Rules of Evidence. We analyze both arguments and also perform a Rule 401 analysis of whether Exhibit 37 constituted proper, relevant impeachment evidence.

A. Rule 407

1. Standard of Review

First, we examine whether Exhibit 37 was a subsequent remedial measure susceptible to exclusion under Rule 407. Our precedent does not clearly provide the standard of review for Rule 407; however, an analysis of our past cases shows that de novo review has consistently been used. As a result, we review the trial court's Rule 407 determination de novo.

In general, appellate courts review a trial court's evidentiary rulings according to an abuse of discretion standard. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141, 139 L. Ed. 2d 508 (1997) ("We have held that abuse of

2. The phrase "on Red Road" does not appear on Exhibit 37, but Lewis confirmed that his notation "northbound stop sign too far out" referred to "on Red Road."

discretion is the proper standard of review of a district court's evidentiary rulings."); *see also Sloan v. Miller Bldg. Corp.*, 128 N.C. App. 37, 45, 493 S.E.2d 460, 465 (1997) (holding that "admission of [evidence] . . . [is] addressed to the sound discretion of the trial court and may be disturbed on appeal only where an abuse of such discretion is clearly shown"). Additionally, "[e]videntiary errors are harmless unless a defendant proves that absent the error a different result would have been reached at trial." *State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893 (2001).

However, in multiple cases, when ruling on issues involving Rule 407, we have considered the matter anew and substituted our own judgment regarding a trial court's evidentiary ruling involving Rule 407. In those cases, we applied de novo review, without explicitly saying so.

For example, the following review of the record took place in *Smith v. N.C. Dept. of Nat. Res. & Cmty. Dev.*:

> Finally, plaintiff contends the Commissioner erred in failing to admit evidence of subsequent remedial measures shown in exhibits number 9 through 18 and discussed in exhibit number 29. As plaintiff correctly points out, it is unclear from the transcript of the proceedings whether or not exhibit 29 was admitted into evidence. For the purposes of this argument, we will assume that it was not. Plaintiff argues the exhibits were admissible under Rules 407 and 803(8) of the North Carolina Rules of Evidence. According to Rule 407, evidence of subsequent remedial measures is not admissible to prove negligence or culpable conduct, but such evidence may be offered for other purposes such as 'proving ownership, control, or feasibility of precautionary measures, if those issues are controverted, or impeachment.' N.C.G.S. § 8C-1, Rule 407 (1992). Rule 803(8) provides that public records and reports are an exception to the hearsay rule. § 8C-1, Rule 803(8) (1992).
>
> Exhibits 9 through 18 are photographs of signs, railings and stairways constructed around the area of Beauty Falls after Richard Smith's death. Plaintiff argues they were admissible under Rule 407 because the State contested the feasibility of precautionary measures. *We disagree.* . . . [T]he park superintendent[] testified that the park could not be made "safe," but admitted that it could be made "safer" and mentioned several examples of possible precautionary measures. We find that the evidence was

> properly excluded under Rule 407, because the State did not challenge the feasibility of precautionary measures, nor did it contest ownership or control of the area.
>
> Alternatively, plaintiff argues the evidence serves to impeach the State's contentions that the area could not be made safe, claiming that the new railings and sign now render that area completely safe. We find this position to be unsupported by the evidence. The fact that no accidents have occurred since the safety measures were put in place does not prove that accidents will not happen at Beauty Falls in the future. We believe the Commissioner correctly concluded that exhibits 9 through 18 were inadmissible.

Smith v. N.C. Dept. of Nat. Res. & Cmty. Dev., 112 N.C. App. 739, 746, 436 S.E.2d 878, 883 (1993) (emphasis added).

We also performed a de novo review in *Benton v. Hillcrest Foods, Inc.*:

> Plaintiffs concede that the instructions to security guards were created after the shootings in issue. However, plaintiffs argue that the instructions, which state that the security guards should lock the door in the event of a disturbance in the parking lot, show the feasibility of precautionary measures and would have impeached defendants' testimony that there was no reason to lock the front door of the restaurant which was open twenty-four hours a day.
>
> A witness for defendant stated, 'There's no reason to lock the door.' However, testimony that there is no reason to lock the door does not address the feasibility of locking the door. Instead, the statement refers to the perceived lack of necessity to do so. Therefore, whether or not it would have been possible to lock the door was not controverted, and evidence that such a measure would have been feasible is not admissible under Rule 407.

Benton v. Hillcrest Foods, Inc., 136 N.C. App. 42, 53, 524 S.E.2d 53, 61 (1999). Immediately after that treatment of Rule 407, we stated "[w]hether to exclude evidence *under Rule 403* is within the sound discretion of the trial court." *Id.* (emphasis added).

Further, in *Lane v. R.N. Rouse & Co.*, after explicitly stating that the standard of review concerning admission of evidence of similar circumstances is abuse of discretion, we did not mention that standard of review when examining a trial court's Rule 407 ruling:

> Finally, Rouse assigns error to the trial court's admission of measures taken by Rouse, immediately following decedent's death, to cover the floor openings with plywood.
>
> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if those issues are controverted, or impeachment. N.C. R. Evid. 407.
>
> Here, Rouse argued repeatedly that it had no control of the construction site on the day of the accident. Rouse's witnesses also questioned the feasibility of covering the floor openings. However, we agree with the trial court that evidence of Rouse's actions in placing covers over the openings immediately after decedent's fall was admissible as evidence of Rouse's control of the work site on the day of the accident and of the feasibility of taking that precautionary measure.

Lane v. R.N. Rouse & Co., 135 N.C. App. 494, 498-99, 521 S.E.2d 137, 140 (1999) (alterations omitted).

In reviewing our precedent, we have performed de novo review of trial courts' Rule 407 rulings without expressly identifying the standard of review. We now perform a de novo review of the Record to determine whether Plaintiff offered the evidence as a subsequent remedial measure, and whether the evidence was admissible.

2. Subsequent Remedial Measures

"According to Rule 407, evidence of subsequent remedial measures is not admissible to prove negligence or culpable conduct, but such evidence may be offered for other purposes such as 'proving ownership, control, or feasibility of precautionary measures, if those issues are controverted, or impeachment.' " *Smith*, 112 N.C. App. at 746, 436 S.E.2d at 883 (quoting N.C.G.S. § 8C-1, Rule 407 (1992)). This general exclusion of subsequent remedial measures stems from the rationale that "[p]recautions against the future cannot be considered as an admission of actionable negligence in the past." *McMillan v. Atlanta & C. Air Line Ry. Co.*, 172 N.C. 853, 855, 90 S.E. 683, 685 (1916). A post-accident report

containing recommendations for improvements is excluded under Rule 407. *Smith*, 112 N.C. App. at 746-47, 436 S.E.2d at 883. Post-incident written notes containing instructions are also excluded under Rule 407. *Benton*, 136 N.C. App. at 53, 524 S.E.2d at 61.

After reviewing the Record and Lewis's testimony, we agree with the trial court's ruling that Lewis's notes in Exhibit 37 concerning the sign's placement ("stop sign too far out") and whether he believed the sign needed to be relocated ("move in closer to SR 1417 for better sight distance") qualified as subsequent remedial measures excludable under Rule 407, unless an appropriate exception applied. *See Benton*, 136 N.C. App. at 53, 524 S.E.2d at 61 (holding that written instructions to security guards after a shooting were excluded under Rule 407). Lewis's notes in Exhibit 37 were made after the traffic collision at issue. In this post-accident report, Lewis made a professional recommendation to move the stop sign, which "would have made the event less likely to occur" if it had been made before the accident and in conjunction with actual movement of the sign. N.C.G.S § 8C-1, Rule 407 (2019). Generally, these notes and post-accident reports should be excluded under Rule 407. *Smith*, 112 N.C. App. at 746-47, 436 S.E.2d at 883.

However, Rule 407 instructs further that evidence of subsequent remedial measures may not serve as a bar to evidence introduced to impeach:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule *does not require the exclusion of evidence of subsequent measures when offered* for another purpose, such *as . . . impeachment.*

N.C.G.S § 8C-1, Rule 407 (2019) (emphasis added). If Plaintiff properly offered the notes in Lewis's post-accident report for impeachment purposes, Rule 407 does not prohibit the admission of Lewis's notes in his post-accident report and no longer applies. We examine whether Plaintiff properly offered Lewis's notes for impeachment purposes.

B. Rule 401

1. Relevance

Next, we examine whether Lewis's testimony was offered for a proper, relevant purpose, to wit: impeachment. "The admissibility of evidence [under N.C.G.S. § 8C-1, Rule 401 (2017)] is governed by a

threshold inquiry into its relevance. In order to be relevant, the evidence must have a logical tendency to prove any fact that is of consequence in the case being litigated." *State v. Holmes*, 263 N.C. App. 289, 302, 822 S.E.2d 708, 720 (2018), *review denied*, 372 N.C. 97, 824 S.E.2d 415 (2019). "Trial court rulings on relevancy technically are not discretionary." *Id.* "Whether evidence is relevant is a question of law . . . [and] we review the trial court's admission of the evidence *de novo*." *State v. Kirby*, 206 N.C. App. 446, 456, 697 S.E.2d 496, 503 (2010). Even though we review these rulings de novo, we give "great deference on appeal" to trial court rulings regarding whether evidence is relevant. *State v. Allen*, 828 S.E.2d 562, 570 (N.C. Ct. App. 2019), *appeal dismissed*, *review denied*, 373 N.C. 175, 833 S.E.2d 806 (2019).

Here, the trial court determined Exhibit 37 was relevant for impeachment purposes, and the deferential standard of Rule 401 informs our approach in reviewing the relevancy of evidence for impeachment under Rule 407. *State v. Stewart*, 231 N.C. App. 134, 139, 750 S.E.2d 875, 878 (2013). Lewis's notes concerning the sign's placement, and whether he believed the sign was in the safest place for visibility on Red Road, had a logical tendency to prove the veracity of his testimony concerning whether the sign at issue in this case should have been placed in a different location. Lewis's notes also had a logical tendency to make his testimony more or less believable to the jury.

2. Impeachment Purposes

A longstanding principle within our jurisprudence provides that "[t]he primary purpose of impeachment is to reduce or discount the credibility of a witness for the purpose of inducing the jury to give less weight to his testimony in arriving at the ultimate facts in the case." *State v. Bell*, 249 N.C. 379, 381, 106 S.E.2d 495, 498 (1959) (quoting *State v. Nelson*, 200 N.C. 69, 72, 156 S.E. 154, 156 (1930)); *see also State. v. Shuler*, 841 S.E.2d 607, 610 (N.C. Ct. App. 2020). "Impeachment evidence has been defined as evidence used to undermine a witness's credibility, with *any* circumstance tending to show a defect in the witness's *perception*, *memory*, *narration or veracity* relevant to this purpose." *State v. Gettys*, 243 N.C. App. 590, 595, 777 S.E.2d 351, 356 (2015) (emphasis added) (quoting *State v. Allen*, 222 N.C. App. 707, 721, 731 S.E.2d 510, 520 (2012)).

The opposing party can impeach by offering evidence of that witness's prior inconsistent statements. *State v. Anderson*, 88 N.C. App. 545, 548, 364 S.E.2d 163, 165 (1988). Plaintiff concedes the inability to call Lewis as an adverse witness for the sole purpose of introducing

Exhibit 37. Had NCDOT not called Lewis as a witness, Exhibit 37 would not have been admissible. However, NCDOT chose to call Lewis as a witness, and we examine the Record for testimonial inconsistencies permitting Plaintiff to use Exhibit 37 for the purpose of undermining Lewis's credibility.

On direct examination, Lewis testified that when he went to the intersection "[he] didn't see an issue safety-wise . . . there wasn't a sight distance issue to the primary stop sign on the right-hand side." More specifically, he testified he did not see any visibility issues regarding the stop sign, the placement of the stop sign was safe, and he could see the stop sign. Lewis explicitly disagreed with the opinions of Marceau, Barrett, and Sutton, all retained experts who testified in the same capacity that the placement of the stop sign created a "visibility conspicuity issue."

Prior to Plaintiff's introduction of Exhibit 37 on cross-examination, Lewis confirmed he had already told the jury "several times" that "there was nothing wrong with that stop sign to the right," there was "no[] visibility issue with th[e] stop sign on the right," and that he "could not find a reason . . . why [French] wouldn't have seen the sign." This testimony directly conflicts with Lewis's notation on Exhibit 37, which states the stop sign was "too far out [on Red Road]" and should be "move[d] in closer to [Red Road] for better sight distance." The notations on Exhibit 37 directly conflict with Lewis's testimony on direct and cross-examinations and tend to discredit his testimonial account of his 2016 inspection. Exhibit 37 and the corresponding testimony on cross-examination were admissible impeachment evidence notwithstanding the general prohibition of evidence of subsequent remedial measures. The trial court did not err in admitting Exhibit 37 for impeachment.

NCDOT asks us to rely on *Benton*, where we placed limits on a plaintiff's ability to cross-examine defense witnesses with evidence of subsequent remedial measures. *Benton*, 136 N.C. App. at 53, 524 S.E.2d at 61. There, a patron was shot and killed during an altercation at a restaurant, and an eyewitness for the defense testified, "[t]here's no reason to lock the door." *Id.* The plaintiff attempted to contradict this testimony by introducing evidence of written instructions, created after the incident, directing security guards to lock the door in case of disturbances in the parking lot. *Id.* at 52-53, 523 S.E.2d at 60-61. We affirmed the trial court's decision to exclude evidence of the written instructions to contradict the witness; the witness's testimony did not address the feasibility of locking the door, an uncontroverted issue, and instead referred only to his perceived lack of necessity of doing so during the incident. *Id.*

Benton is distinguishable from the present case, and NCDOT's reliance on *Benton* is misplaced. Our conclusion regarding Rule 407 in *Benton* turned on whether the parties controverted the feasibility of taking precautionary measures, which is another exception under Rule 407. *Id.* at 53, 524 S.E.2d at 61. In *Benton*, we only discussed impeachment in passing and in relation to proving feasibility. *Id.* The written instructions, which were adopted after the shooting, were not relevant to "show a defect in the witness's perception, memory, narration or veracity" of an eyewitness account of the shooting. *Gettys*, 243 N.C. App. 590 at 595, 777 S.E.2d at 356. Unlike the evidence of subsequent remedial measures at issue in *Benton*, Exhibit 37 is relevant to show a defect in Lewis's perception, memory, and narration, as well as the veracity of his testimony, concerning the safety inspection he conducted following the accident. *See Benton*, 136 N.C. App. at 53, 524 S.E.2d at 61.

NCDOT also contends "[t]he impeachment exception applies when a party initiates the purported testimonial inconsistency and thereby tries to gain an unfair advantage by exploiting the exclusionary provision of Rule 407." To support this assertion, NCDOT cites cases in which evidence of subsequent remedial measures was admissible to impeach a witness who inaccurately described the condition at the time of the accident or asserted the condition was repaired before the accident. *See Tise v. Town of Thomasville*, 151 N.C. 281, 65 S.E 1007 (1909); *Mintz v. Atlantic Coast Line R. Co.*, 236 N.C. 109, 72 S.E.2d 38 (1952). NCDOT also cautions if we allow Plaintiff to impeach Lewis's testimony with a report that reflects a change in his "engineering judgment" based on new "available pertinent information," then the exception will swallow the rule.

While NCDOT cites cases demonstrating how trial courts apply the impeachment exception to combat patently false testimony, it fails to cite any authority limiting application of the impeachment exception to these exclusive purposes. Adoption of such a narrow interpretation of the impeachment exception would actually impermissibly broaden the Rule 407 prohibition of evidence of subsequent remedial measures, which does not allow defendants in negligence cases to "avail themselves of the [prohibition on remedial measures evidence] for the purposes of preventing a fair and full disclosure of pertinent facts not tending to establish negligence." *Pearson v. Harris Clay Co.*, 162 N.C. 224, 226, 78 S.E. 73, 74 (1913). When the Record discloses that a defense witness, on direct examination, testifies about conditions prior to an accident or injury, which Lewis testified to in this case, it is proper on cross-examination to contradict that witness's assertion with evidence

directly controverting the witness's testimony. *Jefferson v. City of Raleigh*, 194 N.C. 479, 482, 140 S.E. 76, 77 (1927); *see generally Tise*, 151 N.C. 281, 65 S.E. 1007.

Plaintiff's use of Exhibit 37 on cross-examination was proper, relevant impeachment—NCDOT called Lewis as a witness, and Exhibit 37 contradicted Lewis's testimony and undermined his credibility. Rule 407 does not exclude Exhibit 37 for such a use, despite the general prohibition of evidence of subsequent remedial measures. The impeachment exception to Rule 407 applies, and Plaintiff's impeachment of Lewis with his own report constituted relevant evidence. Next, we examine whether Rule 403 would prohibit the use of Exhibit 37, despite it being proper, relevant impeachment evidence excepted from Rule 407's general prohibition.

C. Rule 403

NCDOT argues the trial court should have excluded Exhibit 37 because its probative value was substantially outweighed by the danger of unfair prejudice and misleading the jury. We disagree. The trial court did not abuse its discretion in allowing the evidence under Rule 403.

"Rule 403's balancing test mandates the exclusion of prejudicial or otherwise inapplicable evidence when 'its probative value is substantially outweighed' by its prejudicial or inapplicable nature." *State v. Alonzo*, 261 N.C. App. 51, 59, 819 S.E.2d 584, 590 (2018) *modified on other grounds*, 373 N.C. 437, 838 S.E.2d 354 (2020). "Relevant evidence 'may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury[.]' " *State v. Smith*, 263 N.C. App. 550, 566, 823 S.E.2d 678, 689 (2019) (quoting N.C.G.S. § 8C-1, Rule 403 (2019)). We note that "the balance under Rule 403 favors admissibility of probative evidence." *State v. Peterson*, 179 N.C. App. 437, 460, 634 S.E.2d 594, 612 (2006).

"We review a trial court's decision to exclude evidence under Rule 403 for abuse of discretion. An abuse of discretion results when 'the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.' " *State v. Triplett*, 368 N.C. 172, 178, 775 S.E.2d 805, 809 (2015) (quoting *State v. Whaley*, 362 N.C. 156, 160, 655 S.E.2d 388, 390 (2008)).

Exhibit 37 was highly probative to whether Lewis's testimony was credible concerning the stop sign's placement. Lewis prepared the report in Exhibit 37, but his testimony at trial contradicted what he wrote in it. We also note the proper purpose of the direct impeachment; Lewis was not collaterally attacked with a report he did not compose.

NCDOT argues that *Benton v. Hillcrest Foods, Inc.* should guide our analysis regarding Rule 403 balancing in the present case. *Benton*, 136 N.C. App. at 53, 524 S.E.2d at 61. In *Benton*, we reviewed a trial court's Rule 403 exclusion of evidence in the form of written instructions to restaurant security guards, given after a confrontation between patrons, to "lock the door in the event of a disturbance in the parking lot." *Id.* We held "that the proffered evidence [wa]s of slight probative value and present[ed] a danger that the jury would be unfairly prejudiced against [the] defendant for not having taken the remedial measure earlier." *Id.* Unlike the low probative value of post-confrontation written instructions to security guards in *Benton*, Lewis's 2016 inspection notes were highly probative, as they were evidence of his opinion concerning the safety and need for improvement of the stop sign's placement, and contradicted the opinion he later provided before the jury. The risk of unfair prejudice to NCDOT was low. Here, the trial court did not abuse its discretion.

D. Limiting Instruction

NCDOT also argues the trial court committed reversible error because it failed to issue a limiting instruction, after Plaintiff's closing argument, restricting Exhibit 37 to its proper scope. During closing argument, Plaintiff argued that all the evidence, including Exhibit 37 and Lewis's related testimony, proved NCDOT's negligence was the proximate cause of an accident that "killed a nice lady." According to NCDOT, Plaintiff also argued Lewis's testimony and opinions regarding the safety of the stop sign placement were "dishonest," "untruthful," and "could not be trusted."

NCDOT was entitled, *upon request*, to an instruction limiting the jury's consideration of Exhibit 37 to its proper scope. Rule 105 of the North Carolina Rules of Evidence provides:

> When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

N.C.G.S. § 8C-1, Rule 105 (2019). "The admission of evidence which is competent for a restricted purpose without limiting instructions will not be held error in the absence of a request by the defendant for such limiting instructions." *State v. Love*, 152 N.C. App. 608, 617, 568 S.E.2d 320, 326 (2002). Additionally, "[counsel have] wide latitude in arguing their cases to the jury, and have the right to argue every phase of the case

supported by the evidence, and to argue the law as well as the facts." *Jenkins v. Harvey C. Hines Co.*, 264 N.C. 83, 91, 141 S.E.2d 1, 6 (1965).

Although Plaintiff's reference to Exhibit 37 and Lewis's related testimony conceivably had the potential to have the jury consider the evidence for an improper purpose, NCDOT failed to request a limiting instruction. In light of impeachment evidence discrediting Lewis's testimony, Plaintiff had wide latitude to argue Lewis's testimony and opinions regarding the safety of the stop sign placement were "dishonest," "untruthful," and "could not be trusted."

The trial court did not commit reversible error by not issuing a limiting instruction, because NCDOT failed to request an instruction limiting the jury's consideration of Exhibit 37 to its proper scope.

CONCLUSION

Exhibit 37 was a subsequent remedial measure under Rule 407, but fell into the exception in Rule 407 as impeachment evidence and was properly admitted under Rules 407 and 401. Exhibit 37 was relevant evidence contradicting Lewis's perception, memory, or narration, or the veracity of his testimony on direct examination, and the trial court did not abuse its discretion in concluding the probative value was not substantially outweighed by the danger of unfair prejudice. NCDOT failed to request a limiting instruction in accordance with Rule 105 concerning Exhibit 37, and Plaintiff was allowed to make arguments concerning Exhibit 37, upon its proper admission.

NO ERROR.

Judge DILLON concurs in result with separate opinion.

Judge TYSON concurs in part and dissents in part, with separate opinion.

DILLON, Judge, concurring in result.

This matter involves a fatal car accident occurring at an intersection in 2016, where the driver at fault ran a stop sign. After the accident, the North Carolina Department of Transportation ("NCDOT") sent Mr. Lewis (one of its engineers) to the intersection to make a post-accident report. In his report, Mr. Lewis recommended that the NCDOT take remedial action to make the stop sign more obvious to approaching drivers.

At trial, Plaintiff called experts who testified that the NCDOT had been negligent in the placement of the stop sign prior to the accident.

During the NCDOT's case in defense, the NCDOT chose to call Mr. Lewis to refute Plaintiff's experts. The NCDOT's counsel elicited from Mr. Lewis his opinion that the NCDOT had not been negligent in locating the stop sign prior to the accident. Specifically, Mr. Lewis testified that he had visited the intersection in 2014, two years prior to the accident, and that, based on his 2014 visit, it was his opinion that the stop sign was in a safe location. During Plaintiff's cross-examination of Mr. Lewis, Plaintiff questioned him about his visit to the intersection in 2016, shortly after the accident. Over the NCDOT's objection, Plaintiff introduced Mr. Lewis' post-accident report into evidence to impeach his testimony.

The jury returned a verdict in favor of Plaintiff, finding the NCDOT negligent.

On appeal, the NCDOT argues that Mr. Lewis' post-accident report should not have been admitted, based on Rule 407 of our Rules of Evidence, which generally excludes evidence that the defendant took remedial measures *after* an accident to make its property safer. *See* N.C. Gen. Stat § 8C-1, Rule 407 (2016). Indeed, Rule 407 recognizes that actions by a property owner after an accident to make its property safer is *not* an admission that the owner had been negligent in keeping its property safe at the time of the accident. *Id.*

I concur with the result in this case that the trial court did not commit reversible error in admitting the report into evidence based on the reasoning below.

Mr. Lewis' report at issue contains this written notation:

> STOP SIGN TOO FAR OUT. MOVE IN CLOSER TO [THE INTERSECTION] FOR BETTER SIGHT DISTANCE.

This notation was circled. Outside this circled notation was written "YES!"

The above notation contains two different statements by Mr. Lewis, which I address separately.

The first statement – "STOP SIGN TOO FAR OUT" – could reasonably be interpreted as Mr. Lewis' opinion that the stop sign was not in a safe location at the time of the accident . . . that the sign was situated "too far" from the intersection. As such, I conclude that the statement was properly admitted for impeachment purposes, irrespective of

whether it falls within Rule 407.[1] The statement could be interpreted as a direct contradiction of the opinion Mr. Lewis offered during his in-court testimony that the stop sign was not negligently placed.

It was the NCDOT who decided to call Mr. Lewis as a witness. Accordingly, Plaintiff had the right to impeach Mr. Lewis regarding any testimony he gave on direct examination with out-of-court statements he had made to the contrary, including any such statements contained in his post-accident report. Had the NCDOT not called Mr. Lewis, this first statement probably would not have come in to evidence. Accordingly, the trial court correctly allowed this statement in to evidence.

The second statement in the report is Mr. Lewis' recommendation that the stop sign be "move[d] closer to [the intersection] for better sight distance[.]" I agree with my colleagues that this second statement, standing alone, clearly falls within Rule 407. However, unlike the first statement, this second statement does not contradict anything Mr. Lewis testified to during his direct testimony. He never testified that he had *not* recommended the stop sign be moved after his 2016 visit. Accordingly, I conclude the statement was inadmissible.

However, any error in allowing the second statement into evidence was not prejudicial to the NCDOT. Admittedly, Mr. Lewis' recommendation that the stop sign should be moved to make it safer, though not an admission that the stop sign was not safe to begin with, does *suggest* to the jury that Mr. Lewis believed that the NCDOT had been negligent in its original placement of the stop sign. But, here, the jury already heard evidence suggesting that Mr. Lewis thought the stop sign was not in a safe location and that he thought it had been placed "too far" from the intersection. It is almost certain that, based on this first statement alone, the jury already assumed that Mr. Lewis thought remedial action was required. It is unlikely that the second statement – where he actually recommends remedial action – was crucial in swaying the jury to find the NCDOT negligent.

The NCDOT extensively cites to *Benton v. Hillcrest Foods, Inc.*, 136 N.C. App. 42, 524 S.E.2d 53 (1999) to support its position that the trial court committed reversible error. *Benton* is an instructive case on the

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1. It could be argued that this first statement, standing alone, falls outside of Rule 407 in that it does not suggest remedial action. But it could be argued that the statement falls within Rule 407, since it is part of a report commissioned by the NCDOT which recommends that remedial action be taken. However, even if the statement falls within Rule 407, it is still admissible, as Rule 407 allows evidence of remedial action to be admitted if properly offered for impeachment purposes.

nuances of the impeachment exception of the Rule 407 exclusion, but that case does not contradict my position here. In *Benton*, a restaurant patron's estate sued *the restaurant* for failing to maintain a safe environment after the decedent was fatally shot. *Id.* at 46, 524 S.E.2d at 57. After losing at trial, the estate appealed, arguing that the trial court incorrectly disallowed evidence that the restaurant had issued written instructions to its security guards, post-shooting, that the restaurant doors should be locked whenever trouble was detected outside. *Id.* at 53, 524 S.E.2d at 61. Our Court affirmed, concluding that the written instructions were Rule 407 evidence and that the instructions did not contradict evidence offered by the restaurant that "there was no reason to lock the front door." *Id.* at 53, 524 S.E.2d at 61. In rejecting the estate's argument, Judge (future Justice) Timmons-Goodson, writing for our Court, noted that the restaurant's post-shooting instructions to lock the door when danger was detected outside would have only served as impeachment testimony had the restaurant's witness testified that *it was not feasible* to lock the door:

> However, testimony that there is no reason to lock the door does not address the feasibility of locking the door. Instead, the statement refers to the perceived lack of necessity to do so. Therefore, whether or not it would have been possible to lock the door was not controverted, and evidence that such a measure would have been feasible is not admissible under Rule 407.

Id. at 53, 524 S.E.2d at 61. If, however, the written instructions had contained a statement that the restaurant owners thought they had acted imprudently in not having a policy to lock the doors, perhaps *that* statement would have been admissible to impeach the suggestion by the restaurant's witness that the restaurant saw no need to lock the doors.

I conclude that the NCDOT received a fair trial, free from reversible error.

TYSON, Judge, concurring in part and dissenting in part.

I. Background

Shirley Davis Pendergrass died from injuries sustained during a car accident on 4 April 2016. Donnie George Holland qualified as executor for her estate ("Plaintiff"). He filed a wrongful death action against Richard Allan French ("French") for his alleged failure to stop at a stop sign at the intersection of Castalia and Red Roads in Nash County.

French asserted a third-party claim against the North Carolina Department of Transportation ("NCDOT"). Plaintiff was allowed to amend its complaint to bring direct causes of action against NCDOT for negligently installing traffic control devices on Red Road. NCDOT asserted sovereign immunity in its answer to Plaintiff's amended complaint.

Prior to trial, NCDOT also timely filed a motion *in limine* to prevent Plaintiff and French from introducing evidence of its subsequent remedial measures. Plaintiff asserted it was unaware of what witnesses NCDOT would call and who might be subject to cross-examination. The court preliminarily ruled counsel must refrain from commenting on the remedial evidence in front of the jury until the parties addressed the evidence.

At trial, relevant to NCDOT, Plaintiff introduced testimony of two engineers, Daren Marceau and Dr. Rollin Barrett. French presented one engineer, Mike Sutton. NCDOT presented testimony of Christopher Lewis, traffic engineer; Johnnie Paul Hennings, accident reconstruction analyst; and Andy Brown, division traffic engineer. After a hearing outside of the jury's presence, the trial court ruled over NCDOT's objection Plaintiff would be allowed to cross-examine Lewis regarding an aerial drawing and notes thereon he had prepared after the accident. His notes stated the stop sign was too far out from and that it needed to be moved closer to the road for better sight distance. Plaintiff argued this evidence impeached Lewis' prior testimony.

The jury returned a verdict and found French and NCDOT were negligent and awarded $800,000 in damages. NCDOT appealed.

II. Issue

NCDOT argues the trial court erred by allowing Plaintiff to impeach Lewis with Plaintiff's Exhibit 37 in violation of Rule 407. N.C. Gen. Stat. § 8C-1, Rule 407 (2019). NCDOT also argues the trial court abused its discretion and prejudicially erred by allowing this evidence to be admitted in violation of Rule 403. N.C. Gen. Stat. § 8C-1, Rule 403 (2019).

III. Standards of Review

A trial court's evidentiary rulings are generally reviewed by appellate courts under an abuse of discretion standard. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141, 139 L. Ed. 2d 508, 516 (1997) (citations omitted) ("We have held that abuse of discretion is the proper standard of review of a [trial] court's evidentiary rulings."); *see also Sloan v. Miller Bldg. Corp.*, 128 N.C. App. 37, 45, 493 S.E.2d 460, 465 (1997) (holding that "admission of [evidence] . . . [is] addressed to the sound discretion of the trial court

and may be disturbed on appeal only where an abuse of such discretion is clearly shown"). Additionally, regarding prejudice, "[e]videntiary errors are harmless unless a defendant proves that absent the error a different result would have been reached at trial." *State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893 (2001).

"Trial court rulings on relevancy technically are not discretionary." *Id.* "Whether evidence is relevant is a question of law . . . [and] we review the trial court's admission of the evidence *de novo*." *State v. Kirby*, 206 N.C. App. 446, 456, 697 S.E.2d 496, 503 (2010); N.C. Gen. Stat. § 8C-1, Rule 401 (2019). Even though we review relevancy rulings *de novo*, we give the trial court rulings regarding whether evidence is relevant "great deference on appeal." *State v. Allen*, __ N.C. App. __, __, 828 S.E.2d 562, 570 (2019), *appeal dismissed*, *review denied*, 373 N.C. 175, 833 S.E.2d 806 (2019).

As the plurality opinion correctly notes: "We review a trial court's decision to exclude evidence under Rule 403 for abuse of discretion. An abuse of discretion results when 'the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.' " *State v. Triplett*, 368 N.C. 172, 178, 775 S.E.2d 805, 809 (2015) (quoting *State v. Whaley*, 362 N.C. 156, 160, 655 S.E.2d 388, 390 (2008)).

IV. Jurisdiction

NCDOT asserted sovereign immunity to a direct action against the state in its answer to Plaintiff's amended complaint. As sovereign immunity precludes suits directly against the State and is jurisdictional unless expressly waived, this issue is threshold before reaching the merits of NCDOT's claims. In *Batts v. Batts*, 160 N.C. App. 554, 586 S.E.2d 550 (2003), *disc. rev. denied*, 358 N.C. 153, 592 S.E.2d 553 (2004), this Court addressed this issue under a similar factual scenario.

The plaintiff, Stacy Batts, was a passenger in a car operated by Shawan Batts. *Id.* at 555, 586 S.E.2d at 551-52. The complaint alleged a stop sign controlling Mr. Batts direction of travel was obstructed by tree limbs. *Id.* The complaint was filed against Mr. Batts and the Town of Elm City. *Id.* Mr. Batts filed a crossclaim against the Town of Elm City and a third-party complaint against NCDOT. *Id.* The plaintiff then obtained permission of the trial court to amend her complaint to add NCDOT as a defendant and to dismiss her claim against the Town of Elm City. *Id.* at 556, 586 S.E.2d at 552. The trial court denied NCDOT's motion to dismiss the plaintiff's complaint based on sovereign immunity. *Id.*

On appeal, NCDOT also contended proper jurisdiction of the plaintiff's claim was before the Industrial Commission pursuant to the Tort Claims Act. *Id.* at 557, 586 S.E.2d at 552-53. This Court affirmed the trial court's denial of NCDOT's motion to dismiss. *Id.* at 559, 586 S.E.2d at 554.

North Carolina Rule of Civil Procedure 14(c) provides that the State may be joined as a third-party defendant notwithstanding the provisions of the Tort Claims Act. N.C. Gen. Stat. § 1A-1, Rule14(c) (2019). Rule 14(a) provides that a plaintiff may allege a claim against a third-party defendant arising of the transaction or occurrence that is the subject matter of the plaintiff's claim. N.C. Gen. Stat. § 1A-1, Rule14(a) (2019). N.C. Gen. Stat. § 143-291 (2019) indicates sovereign immunity does not prevent the State from being joined as a third-party defendant in wrongful death action. *See Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 332, 293 S.E.2d 182, 187 (1982) ("We recognize that actions for indemnification, as well as actions for contribution, are generally brought by means of a third-party complaint. Rule 14(c) does not limit the nature or character of third-party actions permissible against the State. We therefore hold that the State may be joined as a third-party defendant, whether in an action for contribution or in an action for indemnification, in the State courts.").

This Court concluded the plaintiff's amended complaint against NCDOT was proper.

> Under the clear language of Rule 14(a), once a third-party defendant is added to a lawsuit, a plaintiff may assert claims directly against the third-party defendant, subject only to the limitation that the claim arose out of the same transaction or occurrence as the plaintiff's original claim against the original defendant.
>
> The Tort Claims Act waives sovereign immunity. By the addition of Rule 14(c), the General Assembly created an exception to the general rule that claims against the State under the Tort Claims Act must be pursued before the Industrial Commission as to third-party claims. . . . By adding subsection (c) to Rule 14, the General Assembly waived the State's immunity to claims brought by a plaintiff under Rule 14(a), subject to the express limitations contained therein.

Batts, 160 N.C. App.at 557, 586 S.E.2d at 552-553. Jurisdiction was proper in the superior court.

V. Analysis

A. Rule 407

We all agree the trial court correctly ruled Lewis' notes and recommendations in Exhibit 37 concerning the sign's placement ("stop sign too far out") and whether he believed the sign needed to be relocated ("move in closer to SR 1417 for better sight distance") qualified under Rule 407 as subsequent remedial recommendations and measures and were properly excluded unless an appropriate exception applies. N.C. Gen. Stat. § 8C-1, Rule 407; *see Benton v. Hillcrest Foods, Inc.*, 136 N.C. App. 42, 53, 524 S.E.2d 53, 61 (holding that written instructions to security guards after a shooting were excluded under Rule 407). The trial court properly ruled that Plaintiff was "prohibited from mentioning [subsequent remedial measures] during jury selection or [the] case in chief," but reserved the issue for decision if the "matter [became] a direct issue" upon NCDOT's presentation of evidence.

When measures are taken after an event, which if taken previously would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. N.C. Gen. Stat. § 8C-1, Rule 407. "Precautions against the future cannot be considered as an admission of actionable negligence in the past." *McMillan v. Atlanta & C. Air Line Ry. Co.*, 172 N.C. 853, 855, 90 S.E. 683, 685 (1916). A post-accident report containing recommendations for improvements or remediation is excluded under Rule 407. *Smith v. N.C. Dept. of Nat. Resources*, 112 N.C. App. 739, 746-47, 436 S.E.2d 878, 883 (1993). Post-incident written notes containing instructions are also excluded under Rule 407. *Benton*, 136 N.C. App. at 53, 524 S.E.2d at 61.

"This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if those issues are controverted, or impeachment." N.C. Gen. Stat. § 8C-1, Rule 407; *see Lane v. R.N. Rouse & Co.*, 135 N.C. App. 494, 498-99, 521 S.E.2d 137, 140 (1999).

It is undisputed Lewis' notes in Exhibit 37 were made during a required site visit and review after the fatal traffic accident at issue had occurred. Lewis made a professional observation and recommendation in this 2016 post-accident report to move the stop sign, which "would have made the event less likely to occur" if it had been made before the accident and in conjunction with actual movement of the sign. N.C. Gen. Stat. § 8C-1, Rule 407. NCDOT properly asserted and the trial court

correctly ruled preliminarily Lewis' post-accident report should be excluded from evidence under Rule 407. *Id.*; *Smith*, 112 N.C. App. at 746-47, 436 S.E.2d at 883.

This correct ruling, together with NCDOT's continuing objections, shifted to Plaintiff the burden to show a basis to allow admission. Whether Plaintiff met this burden becomes the pivotal question before us. Lewis' direct testimony that the sign was visible was not impeached. His post-accident statement could not be admitted on this basis. N.C. Gen. Stat. § 8C-1, Rule 407.

Under Rule 407 and the trial court's ruling, Plaintiff also concedes his inability to have called Lewis as an adverse witness for the sole purpose of introducing Exhibit 37, even though he was the author of the notes and comments on the exhibit. Had NCDOT not called Lewis as a witness, Exhibit 37 would not have been admissible under the trial court's ruling. *Id.*

As noted above, evidence of subsequent remedial measures, including post-incident written notes containing instructions, is not admissible to prove prior negligence or culpable conduct, but such evidence may be admitted by Plaintiff showing other purposes such as "proving ownership, control, or feasibility of precautionary measures, if those issues are controverted, or impeachment." *Id.*; *Benton*, 136 N.C. App. at 53, 524 S.E.2d at 61.

When a party is attempting under Rule 407 to introduce evidence of a subsequent remedial measure for impeachment, the party must make an offer of proof containing:

> [1.] What the witness will testify to if the judge permits the proponent to pursue the line of inquiry.
>
> [2.] The evidence is logically relevant to some issue other than the general question of negligence or fault.
>
> [3.] The issue the evidence relates to is disputed in the case.

Robert P. Mosteller et al., *North Carolina Evidentiary Foundations*, Ch. 8, § 8-7(B) (3d ed. 2014).

Here, Plaintiff failed to lay a foundation and did not introduce any evidence this information is logically relevant to some issue other than the general question of NCDOT's negligence or fault. If Plaintiff meets its burden, Exhibit 37 may be subject to be admitted under the exceptions listed in Rule 407. Additionally, each line of notation on Exhibit 37

asserted as admissible needs to be subjected to the above analysis prior to admission. *Id.*

NCDOT argues this Court's decision in *Benton* is dispositive to exclude Exhibit 37. In *Benton*, we limited a plaintiff's ability to cross-examine defense witnesses with evidence of subsequent remedial measures. *Benton*, 136 N.C. App. at 53, 524 S.E.2d at 61. A patron was shot and killed during an altercation at a restaurant. *Id.* An eyewitness for the defense had testified, "[t]here's no reason to lock the door." *Id.* Plaintiff attempted to undermine and impeach this testimony by introducing into evidence written instructions, created after the incident, which directed the restaurant's security guards to lock the door in case of disturbances occurring in the parking lot. *Id.* at 52-53, 523 S.E.2d at 60-61.

This Court affirmed the trial court's decision to exclude evidence of the written instructions to contradict the witness' testimony. We held the witness' testimony did not address the feasibility of locking the door, an uncontroverted issue, and instead referred only to the witness' belief of the lack of necessity of doing so during the incident. *Id.*

More than two years had elapsed since Lewis' first visit to the rural site in 2014, the basis of his direct testimony, and again in late 2016 for the required post-accident visit. Plaintiff laid no foundation or showing that the conditions Lewis had observed in 2014 had not changed or were similar to those he observed after the accident in 2016. *Mintz v. Atlantic Coast Line R. Co.*, 236 N.C. 109, 72 S.E.2d 38 (1952); *Tise v. Town of Thomasville*, 151 N.C. 281, 65 S.E 1007 (1909).

Plaintiff failed to carry its burden by not offering how "[t]he evidence is logically relevant to some issue other than the general question of negligence or fault" in the face of NCDOT's motion *in limine* and continuing objection to admission and the trial court's prior ruling. Mosteller, *North Carolina Evidentiary Foundations*, § 8-7 (B). I vote to reverse the trial court's decision to allow cross-examination of Lewis based upon his 2016 post-accident review, recommendations, and the remedial actions taken. N.C. Gen. Stat. § 8C-1, Rule 407. I respectfully dissent.

B. Rule 403

Even if Lewis' post-accident notes and recommendations were admissible under the impeachment exception to Rule 407, NCDOT argues the trial court should have excluded Exhibit 37 under Rule 403. NCDOT asserts the danger of unfair prejudice and misleading the jury

substantially outweighed its probative value. This Court has held: "Rule 403's balancing test mandates the exclusion of prejudicial or otherwise inapplicable evidence when 'its probative value is substantially outweighed' by its prejudicial or inapplicable nature." *State v. Alonzo*, 261 N.C. App. 51, 59, 819 S.E.2d 584, 590 (2018), *modified on other grounds*, 373 N.C. 437, 838 S.E.2d 354 (2020).

NCDOT urges this Court to overturn the trial court's decision to allow Plaintiff to impeach Lewis' testimony regarding conditions he observed in 2014 with a post- accident 2016 report that reflects a change in his "engineering judgment" based on new post-accident "available pertinent information." It argues that to affirm the trial court's application of the rule would allow the exceptions to swallow the overriding policy for the rule of exclusion to encourage remedial repairs.

NCDOT acknowledges the trial court's admission of evidence of remedial measures under the Rule 407 exceptions pursuant to Rule 403 is reviewed on appeal for abuse of discretion. *See Benton*, 136 N.C. App. at 53, 524 S.E.2d at 61 (holding whether to exclude evidence is within the sound discretion of the trial court and will not be disturbed "absent a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision").

NCDOT also argues the probative value was substantially outweighed by prejudice because by Plaintiff using a "blown-up poster" of Lewis' 2016 post-accident note, Plaintiff and French were allowed to "falsely" and aggressively cross-examine Lewis and to argue this properly excluded evidence in closing argument.

Plaintiff counters these arguments and cites a federal circuit court case as persuasive authority. In *Dollar v. Long Mfg., N.C., Inc.*, the plaintiff sought to introduce a warning letter from a witness to contradict his trial testimony about the safety of a backhoe when attached to a certain tractor. *Dollar v. Long Mfg., N.C., Inc.*, 561 F.2d 613, 618 (5th Cir. 1977). The federal court analyzed the Federal Rule of Evidence 403, holding:

> Rule 403 authorizes the exclusion of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, we do not think this situation called for its application. In the face of Saunders' testimony as to his present opinion of the safety of the backhoe when attached to a rollbar-equipped tractor, we do not think unfair prejudice to the defendant would have resulted from his having been confronted by his own letter warning of exposure to death by such use. Of course,

> "unfair prejudice" as used in Rule 403 is not to be equated with testimony simply adverse to the opposing party. Virtually all evidence is prejudicial or it isn't (sic) material. The prejudice must be "unfair."

Id.

I agree with NCDOT that presuming this line of questioning was permissible under the exceptions to Rule 407, "its probative value is substantially outweighed by its prejudicial or inapplicable nature" under Rule 403. N.C. Gen. Stat. § 8C-1, Rule 403. I also respectfully dissent from the plurality opinion's holding to the contrary.

VI. Conclusion

The trial court correct ruled that Rule 407's general prohibition of admission of evidence of subsequent remedial measures precludes admission of Exhibit 37. NCDOT lodged a continuing objection to this questioning. Plaintiff failed to lay a required foundation to carry his burden to show Lewis' post-accident 2016 notes, recommendation, and report did not remain within the exclusion of Rule 407.

We all agree Exhibit 37 was prepared post-accident, recommended and documented subsequent remedial measures implemented under Rule 407. Plaintiff failed to carry its burden to show Lewis' post-accident 2016 report fell into an exception in Rule 407 as impeachment evidence to be properly admitted. In the alternative, the probative value of Lewis' statements was substantially outweighed by the danger of unfair prejudice under Rule 403. NCDOT is entitled to a new trial. I concur in part and respectfully dissent in part.

IN RE J.M.

[273 N.C. App. 280 (2020)]

IN THE MATTER OF J.M., D.M., AND K.M.

No. COA19-724

Filed 1 September 2020

1. Child Abuse, Dependency, and Neglect—permanency planning review hearing—waiver of counsel—knowing and voluntary—written findings

In a permanency planning matter, the trial court properly treated a respondent-mother's answers during a colloquy as a waiver of respondent's right to counsel, but the matter was remanded for entry of written findings regarding whether the waiver was knowing and voluntary pursuant to N.C.G.S. § 7B-602(a1).

2. Child Visitation—grandmother as guardian—discretion regarding visitation—improper delegation of authority

A guardianship order was vacated and remanded where the trial court improperly delegated its judicial authority by granting a child's grandmother, who was made guardian of the child, discretion to modify the parameters of respondent-mother's visitation depending on respondent-mother's conduct.

Appeal by Respondent-Mother from orders entered 23 January 2019 by Judge Elizabeth Trosch in District Court, Mecklenburg County. Heard in the Court of Appeals 26 May 2020.

Senior Associate County Attorney Kristina A. Graham for Mecklenburg County Department of Social Services, Petitioner-Appellee.

William L. Gardo II for Guardian ad Litem.

Peter Wood for Respondent-Appellant.

McGEE, Chief Judge.

Respondent-Mother ("Respondent") appeals from a permanency planning order and guardianship order granting guardianship of her children J.M., D.M., and K.M. to their maternal grandmother (the "grandmother") and awarding her visitation. On appeal, Respondent argues the trial court erred in (1) treating her request for a new attorney as a waiver of counsel and (2) granting the grandmother discretion over

Respondent's visitation with her children. We remand the permanency planning order to the trial court for written findings of fact sufficient to demonstrate that Respondent's waiver of counsel was knowing and voluntary. We also vacate and remand the part of the permanency planning order and the guardianship order granting the grandmother discretion over Respondent's visitation with the children.

I. Factual and Procedural History

Respondent has four children: J.M, D.M., K.M., and T.L.[1] Father ("Father") is the biological father of J.M., D.M., and K.M. (the "children"), but not T.L. The Mecklenburg County Department of Social Services, Youth and Family Services ("DSS") received a child protective services ("CPS") report concerning all four children on 6 February 2017. Following an investigation, DSS filed a petition on 19 May 2017 alleging that J.M., D.M., K.M., and T.L. were neglected and dependent juveniles.

The petition alleged that at the time of the CPS investigation, both Respondent and Father were homeless and, as a result, Respondent had placed the children in the care of the grandmother. Respondent picked the children up from the grandmother's home on 16 March 2017 and dropped them off the next day at DSS explaining, in front of the children, "that she didn't want them." After the children were returned to the grandmother's home, Respondent contacted DSS and explained that she wanted to relinquish her rights to the children. Respondent appeared at the grandmother's home on 18 May 2017—holding a box cutter—and demanded to see the children. Charlotte Mecklenburg Police Officers arrived at the grandmother's house and drove K.M. and D.M. to school, but Respondent refused to let J.M. out of her arms until DSS arrived at the house. Respondent expressed that she would rather the children be placed in foster care, even if they had to be split up, than remain in the grandmother's care.

After appointing Donna Jackson ("Ms. Jackson") as provisional counsel for Respondent, the trial court conducted an adjudication hearing on 22 August 2017. At the end of the hearing, after the trial court announced its finding in open court that the children were neglected and dependent juveniles, the following occurred:

> MS. JACKSON: Your Honor, I have not turned in an affidavit of indigency, but at this time, [Respondent] is wanting me to withdraw. So I don't know if you want to address that issue with her.

1. T.L. has turned 18 years old and is not part of this appeal.

> THE COURT: Well, [Respondent], because your children have been adjudicated neglected and dependent, you do have the right to the assistance of a lawyer during these hearings. And if you are unable to afford to pay a lawyer, you have the right to a court-appointed lawyer. I think we went over this some time ago. So do you want the help of a lawyer during these proceedings?
>
> [RESPONDENT]: No, I don't.
>
> THE COURT: You want to represent yourself?
>
> [RESPONDENT]: Yes.
>
> THE COURT: You sure about that?
>
> [RESPONDENT]: Uh-huh (yes).
>
> MR. SMITH: Your Honor, the Department (inaudible) Ms. Jackson remain (inaudible).
>
> THE COURT: Are you asking that Ms. Jackson withdrew [sic] and be removed from representing you?
>
> [RESPONDENT]: Yes.
>
> THE COURT: Okay. Well, just to ensure that your due process rights are protected, I mean I don't have any reason not to accept your waiver of your right to counsel, and I'll find that you waived your right to counsel. But at least for the next hearing, I'm going to ask Ms. Jackson to remain as standby counsel, for which role, Ms. Jackson, you can still submit an application. Okay? So that if there are legal issues that come up at the next hearing and you need a lawyer, you want some help just getting an explanation or understanding that, I just want her to be here to answer those questions in case they come up. Okay?
>
> [RESPONDENT]: Uh-huh (yes).
>
> THE COURT: Just to make sure that you have whatever help you may need at the next hearing. Okay? Okay. Then we're adjourned.

In the adjudication order entered 5 September 2017, the trial court made the following pertinent findings of fact: Respondent's mental health diagnoses have included bipolar disorder, schizophrenia, narcissistic personality disorder, and schizo-affective disorder. Between 2002

and August 2016, DSS received 21 CPS reports regarding Respondent's care of the children, including allegations that Respondent's mental illness impacted her ability to care for the children, domestic violence with Father, drug use in the home, and Respondent encouraging T.L. to kill herself. Regarding Respondent's counsel, the trial court found: Respondent "waived her right to counsel at the end of the adjudication hearing and informed the Court that she will represent herself. [DSS] objected. [Respondent] may exercise her right to waive counsel; however the Court will appoint Ms. Jackson in a standby capacity." The trial court continued the children's custody with DSS and continued supervised visitation between Respondent and the children.

Ms. Jackson appeared as standby counsel for Respondent at the disposition hearing on 11 September 2017. In the disposition order entered 26 September 2017, the trial court established a primary plan of reunification with Respondent or Father with a secondary plan of adoption and continued supervised visitation between Respondent and the children. Ms. Jackson appeared as standby counsel at a review hearing on 13 November 2017.

The trial court held a permanency planning hearing on 27 June 2018. At the start of the hearing, the trial court told Respondent that Ms. Jackson was in a different hearing and asked Respondent what she wanted to do. Respondent expressed her desire to proceed with the hearing without Ms. Jackson. Following the hearing, the trial court entered an order expanding Respondent's visitation to two hours of unsupervised visitation per week.

Ms. Jackson filed a motion to withdraw as attorney of record for Respondent on 22 October 2018 because she "ha[d] become seriously ill and c[ould] not continue to represent" Respondent. The trial court granted Ms. Jackson's motion and appointed Rhonda Hitchens[2] ("Ms. Hitchens") as Respondent's standby counsel. A permanency planning hearing and visitation hearing was scheduled on 4 December 2018. At the start of the hearing, Ms. Hitchens requested that the court continue the permanency planning hearing to a later date, but proceed with the visitation hearing. The following exchange ensued:

> THE COURT: So are you aware that [Respondent] is representing herself?

---

2. In the order appointing new counsel and the 20 December 2018 "visitation order and subsequent permanency planning hearing continuance order," Respondent's counsel is listed as "Rhonda Wilson." However, in the transcript and DSS reports, Respondent's counsel is listed as "Rhonda Hitchens."

MS. HITCHENS: Yes.

THE COURT: And that you are standby counsel?

MS. HITCHENS: Well, we had that conversation. I apologize, I should have started with that. So we had that conversation. She said that Ms. Jackson was her standby counsel.

THE COURT: Hmm-hmm.

MS. HITCHENS: She went through my bar information, and she was able to verify that I was really a lawyer. She came up here to verify that I was appointed to represent her. She verified all that information. And once we talked, she decided that she wanted me to represent her. She didn't want me as her standby counsel. But I guess the Court would have to have her here to say that.

The trial court spoke directly to Respondent:

THE COURT: All right. So, [Respondent], you recall several months ago we talked about the fact that you have the right to the help of a lawyer. Do you remember that?

[RESPONDENT]: Yes.

THE COURT: And that if you can not afford to hire a lawyer, you have the right to a court-appointed lawyer. Do you remember that?

[RESPONDENT]: Yes, ma'am.

THE COURT: Now, at that time, kind of at the beginning of this case, you said that you did not want a lawyer, that you wanted to represent yourself. Do you remember that?

[RESPONDENT]: I do.

THE COURT: And I ordered Ms. Jackson to remain as standby counsel.

[RESPONDENT]: Correct.

THE COURT: So are you -- have you changed your position as to whether you want the help of a lawyer?

[RESPONDENT]: Yes.

THE COURT: Okay. What is your position today? What do you want today?

> [RESPONDENT]: Oh, I want her to -- Ms. Hitchens, I'm sorry, to represent me.
>
> THE COURT: So you do want the help of a lawyer today?
>
> [RESPONDENT]: Yes.
>
> THE COURT: And you're asking for a court appointed lawyer?
>
> [RESPONDENT]: Yes.
>
> THE COURT: Can you afford to hire a lawyer?
>
> [RESPONDENT]: No.

The trial court found Respondent was indigent and appointed Ms. Hitchens as Respondent's counsel. The trial court then continued the permanency planning hearing until 8 January 2019 and proceeded to the hearing on visitation.

During the visitation hearing, a DSS social worker testified that Respondent's overnight visitation had been eliminated in mid-November 2018 after DSS "became concerned about [Respondent's] mental status because of the incidents that were occurring[;]" notably, Respondent sprayed pepper spray in her niece's face on 9 November 2018, remained parked outside the grandmother's home for 12 hours on 10 November 2018, and communicated threats to the grandmother at her home on 18 November 2018. The social worker explained that based on Respondent's behavior, DSS changed Respondent's visitation with the children from unsupervised to supervised.

Following the hearing, the trial court entered a "visitation order and subsequent permanency planning hearing continuance order" on 20 December 2018. In regard to Respondent's motion to continue the permanency planning hearing, the trial court found:

> 1. [Respondent] requested that the Court appoint Ms. Wilson as her attorney. Ms. Wilson was previously appointed as standby counsel as [Respondent] [chose] to represent herself at prior hearings.
>
> . . . .
>
> 3. The Court explained that the next hearing would not be continued if [Respondent] changed her mind about counsel and counsel's role at the next hearing. The permanency planning review hearing is continued in the interest of justice.

Regarding visitation, the trial court found that "visitation needs to be adjusted" for Respondent. Explaining that "[t]he [c]ourt is concerned about the respondent mother's recent behaviors of sitting outside her mother's home for most of a day and pepper spraying her [niece] during an argument[,]" the trial court found that "[t]here has been a deterioration" in Respondent's mental health that necessitated she "schedule an appointment with her therapist and medication management doctor." The trial court found Respondent's visitation with the children "needs to remain supervised until she demonstrates mental health stability."

The trial court conducted the permanency planning hearing on 8 January 2019. At the start of the hearing, the court addressed Respondent:

> THE COURT: All right. So, [Respondent], umm, Ms. Hitchens did inform me in the presence of the other attorneys that you are asking that she be released as your attorney. Is that correct?
>
> [RESPONDENT]: Yes.
>
> THE COURT: So you understand that in these proceedings, you have the right to the help of a lawyer. Do you understand that?
>
> [RESPONDENT]: I can't hear you.
>
> THE COURT: Do you understand that in these kinds of cases, cases involving abuse and neglect, that you have the right to the help of a lawyer?
>
> [RESPONDENT]: Yes. THE COURT: And you understand that when you cannot afford to hire a lawyer, you have the right to a court-appointed lawyer?
>
> [RESPONDENT]: Yes.
>
> THE COURT: Okay. Now Ms. Hitchens had been appointed to represent you; is that correct?
>
> [RESPONDENT]: Yes.
>
> THE COURT: Do you want the help [of] a lawyer today?
>
> [RESPONDENT]: Not Ms. Hitchens. Or just a lawyer, period?
>
> THE COURT: Do you want the help of a lawyer?

> [RESPONDENT]: I don't know.
>
> THE COURT: Well, do you want Ms. Hitchens to continue to represent you or not?
>
> [RESPONDENT]: No.
>
> THE COURT: Okay. So are you asking that she be released as your court-appointed lawyer?
>
> [RESPONDENT]: Yes.
>
> THE COURT: Now, you understand that if I release her, you may not be able to have the help of a lawyer at all. She is the second lawyer that's been involved in your case, and this would be the second time that you've asked the Court to dismiss a lawyer. Do you understand that?
>
> [RESPONDENT]: Hmm-hmm.
>
> THE COURT: So is it your desire to proceed with the hearing today without the help of a lawyer?
>
> [RESPONDENT]: Yes.
>
> THE COURT: Okay. I'm going to ask Ms. Hitchens just to remain as standby counsel in case something comes up and you have a question and need her help. Okay? But at this point, we're going to proceed with you representing yourself, which you have done in other hearings. Okay?
>
> [RESPONDENT]: Hmm-hmm

The hearing proceeded with Respondent representing herself and Ms. Hitchens serving as standby counsel. DSS and the guardian ad litem expressed their shared recommendation that the grandmother be named guardian and Father and Respondent have visitation; DSS presented the court with a proposed visitation agreement. Respondent questioned witnesses and expressed her disagreement with the grandmother being named guardian because Respondent had "been doing everything on [her] case plan that [she] need[ed] to."

The trial court announced its determination that "it is in the best interest of these children that they not remain in the custody of the Department, and that they be placed in the guardianship of the maternal grandmother." Further, the trial court explained that the visitation plan proposed by DSS "is in the best interests of the children," but explained it would be making a "few modifications," including that "the

grandmother shall have authority to modify conditions or duration of a visit of either parent if there[']s evidence that the demeanor or conduct of the parent could inflict emotional distress or cause harm to any one of the children." Finally, the trial court announced that Respondent or Father had the right to file a motion in the future if either parent wanted "different or more visitation or . . . fe[lt] like things have improved[.]" Respondent stated, "[t]hat's fine, I'm going to appeal."

On 23 January 2019, the trial court entered the "subsequent permanency planning hearing #1 order" (the "permanency planning order") and the guardianship order, granting the grandmother guardianship of the children. The permanency planning order and the guardianship order both noted that Respondent's attorney had been "released on [Respondent's] motion" and adopted DSS's proposed visitation agreement, with the following modifications:

> The parents shall not visit the juveniles together. [The grandmother] shall have authority to modify the conditions or duration of visits for either parent if there is evidence that the demeanor or conduct of either parent would cause emotional distress or harm to the children.

The comprehensive visitation agreement, adopted by the trial court, provided Respondent with four hours of unsupervised visitation and two hours of unsupervised "phone calls/facetime/skype" per week with the children.

Respondent appeals from the permanency planning order and the guardianship order.

II. Analysis

A. Waiver of Counsel

[1] Respondent contends that the trial court erred at the 8 January 2019 hearing by treating her request for a new attorney as a waiver of counsel. As a result, Respondent asserts the trial court failed to conduct the appropriate statutory inquiry. We hold that the trial court correctly treated Respondent's request at the 8 January 2019 hearing as a waiver of counsel. However, we remand to the trial court to make written findings of fact sufficient to demonstrate that Respondent's waiver was knowing and voluntary.

N.C. Gen. Stat. § 7B-602 states that "[i]n cases where the juvenile petition alleges that a juvenile is abused, neglected, or dependent, the parent has the right to counsel and to appointed counsel in cases of

indigency unless that person waives the right." N.C. Gen. Stat. § 7B-602(a) (2019). Furthermore, "[a] parent qualifying for appointed counsel may be permitted to proceed without the assistance of counsel only after the court examines the parent and makes findings of fact sufficient to show that the waiver is knowing and voluntary." N.C. Gen. Stat. § 7B-602(a1).

Respondent cites *In re S.L.L.*,167 N.C. App. 362, 605 S.E.2d 498 (2004), in arguing that the trial court erred by equating her request for new counsel as a waiver of court-appointed counsel. In that case, following the release of his court-appointed counsel, the respondent-father stated, "I want counsel" on two occasions. *Id.* at 363, 605 S.E.2d at 499. The trial court explained to the respondent that, based on his decision to proceed without the help of two different court-appointed attorneys, he was "just going to have to represent [himself]" as the trial court was unable to "continue the case ad infinitum until [the respondent] f[ound] an attorney [he was] pleased with[.]" *Id.* On appeal, this Court noted that the respondent did not "expressly and voluntarily waive his right to counsel" but, instead, "repeatedly requested new counsel." *Id.* at 364, 605 S.E.2d at 499. As a result, this Court held that "the trial court erred by equating [the] respondent's request for new counsel with a waiver of court-appointed counsel, and requiring [the] respondent to proceed to trial pro se." *Id.* at 365, 605 S.E.2d at 500.

The present case is distinguishable from *S.L.L.* because Respondent *did not* ask for a new court-appointed attorney at the 8 January 2019 hearing. Although Respondent initially stated, "I don't know" when asked by the trial court if she wanted the help of an attorney, she ultimately clarified, after a series of follow-up questions, that it was her desire to proceed with the hearing without the help of an attorney. Thus, we reject Respondent's assertion that the trial court incorrectly treated her request for new counsel as a request to waive her right to counsel.

Having established that Respondent did not request new counsel, we next determine whether Respondent's waiver of counsel was adequate under N.C. Gen. Stat. § 7B-602(a1); *i.e.* whether the waiver occurred "after the court examine[d] the parent and ma[de] findings of fact sufficient to show that the waiver [was] knowing and voluntary." N.C. Gen. Stat. § 7B-602(a1). This Court held that where a "trial court undertook a fairly lengthy dialogue with [a] respondent mother to determine her awareness of her right to counsel and the consequences of waiving that right[,]" "the trial court's inquiry was adequate to determine whether [the] respondent mother knowingly and voluntarily waived her right to counsel." *In re A.Y.*, 225 N.C. App. 29, 39, 737 S.E.2d 160, 166 (2013).

In the present case, the trial court informed Respondent of her right to counsel and her right to have appointed counsel, and then explained that if she chose to release to Ms. Hitchens—the second attorney appointed to represent her—the hearing would "proceed with [Respondent] representing [herself], which [she] ha[d] done in other hearings." Respondent confirmed that she understood her right to have appointed counsel and also understood that she "may not be able to have the help of a lawyer at all." The trial court inquired whether it was Respondent's request that Ms. Hitchens be released as her court-appointed lawyer; Respondent replied, "yes." The trial court again asked Respondent if she wanted to proceed in that hearing *without the help of a lawyer* and Respondent replied, "yes." Thus, it appears that "the trial court's inquiry was adequate to determine whether [Respondent] knowingly and voluntarily waived her right to counsel." *In re A.Y.*, 225 N.C. App. at 39, 737 S.E.2d at 166.

However, the trial court failed to make "findings of fact sufficient to show that the waiver [was] knowing and voluntary." N.C. Gen. Stat. § 7B-602(a1). The permanency planning order does note that Respondent's attorney was "released on [Respondent's] motion[;]" however, the order is devoid of any findings regarding Respondent's waiver of counsel and decision to proceed *pro se*. As a result, we remand to the trial court for the entry of written findings of fact on whether Respondent's waiver of counsel was knowing and voluntary. Should the trial court determine that Respondent's waiver of counsel was not knowing or voluntary, Respondent shall be entitled to relief from the permanency planning order and a new permanency planning hearing shall be held. *Cf. In re S.N.W.*, 204 N.C. App. 556, 561, 698 S.E.2d 76, 79 (2010) (remanding to the trial court for findings of fact on an ineffective assistance of counsel claim).

B. Visitation

[2] Respondent also contends that the trial court impermissibly delegated a judicial function by granting the grandmother discretion over Respondent's visitation with the children. We must agree.

"This Court reviews the trial court's dispositional orders of visitation for an abuse of discretion." *In re C.M.*, 183 N.C. App. 207, 215, 644 S.E.2d 588, 595 (2007) (citation omitted). Visitation in juvenile matters is controlled by N.C. Gen. Stat. § 7B-905.1, which provides, in pertinent part, as follows:

> (a) An order that removes custody of a juvenile from a parent, guardian, or custodian or that continues the juvenile's

> placement outside the home shall provide for visitation that is in the best interests of the juvenile consistent with the juvenile's health and safety, including no visitation. The court may specify in the order conditions under which visitation may be suspended.
>
> (b) If the juvenile is placed or continued in the custody or placement responsibility of a county department of social services, the court may order the director to arrange, facilitate, and supervise a visitation plan expressly approved or ordered by the court. The plan shall indicate the minimum frequency and length of visits and whether the visits shall be supervised. Unless the court orders otherwise, the director shall have discretion to determine who will supervise visits when supervision is required, to determine the location of visits, and to change the day and time of visits in response to scheduling conflicts, illness of the child or party, or extraordinary circumstances. . . . If the director makes a good faith determination that the visitation plan is not consistent with the juvenile's health and safety, the director may temporarily suspend all or part of the visitation plan. . . .
>
> (c) If the juvenile is placed or continued in the custody or guardianship of a relative or other suitable person, any order providing for visitation shall specify the minimum frequency and length of the visits and whether the visits shall be supervised. The court may authorize additional visitation as agreed upon by the respondent and custodian or guardian.

N.C. Gen. Stat. § 7B-905.1(a)-(c) (2019).

This Court has also explained that a trial court may not delegate its judicial function of awarding visitation to a juvenile's custodian:

> [the] judicial function [of awarding visitation] may [not] be . . . delegated by the court to the custodian of the child. Usually those who are involved in a controversy over the custody of a child have been unable to come to a satisfactory mutual agreement concerning custody and visitation rights. To give the custodian of the child authority to decide when, where[,] and under what circumstances a parent may visit his or her child . . . would be delegating a judicial function to the custodian.

In re J.D.R., 239 N.C. App. 63, 75, 768 S.E.2d 172, 180 (2015) (quoting *In re Stancil*, 10 N.C. App. 545, 552, 179 S.E.2d 844, 849 (1971)).

Respondent argues that the trial court's provision allowing the grandmother "to modify the conditions or duration of visits for either parent if there is evidence that the demeanor or conduct of either parent would cause emotional distress or harm to the children" is an improper grant of judicial authority. DSS asserts that the provision does not grant the grandmother discretion over Respondent's visitation because the grandmother is not authorized to terminate or suspend visitation; rather, she is only allowed "to change the conditions and length of the visit upon the same good faith granted to DSS that the visit is not in the juveniles' best interest."

Under N.C. Gen. Stat. § 7B-905.1(b)—the subsection applicable to juveniles in DSS custody—DSS is authorized to "temporarily suspend all or part of the visitation plan" if "the director makes a good faith determination that the visitation plan is not consistent with the juvenile's health and safety." However, N.C. Gen. Stat. § 7B-905.1(c)—the subsection applicable to juveniles in the custody or guardianship of a relative—contains no similar statutory provision allowing for the temporary suspension of visitation based on a "good faith determination." Further, this Court has recognized a distinction, in the context of visitation, between a court's award of discretion to DSS and a court's award of discretion to a guardian. *See In re K.W.*, ___ N.C. App. ____, ____, ___ S.E.2d ___, ___, 2020 WL 4091362, at *6 (July 21, 2020) (explaining that the cases relied upon by the respondent-mother "involve a grant of authority by the court to a guardian, not DSS, and are therefore distinguishable from this case").

In *In re C.S.L.B.*, 254 N.C. App. 395, 829 S.E.2d 492 (2017), this Court addressed the trial court's award of discretion over the respondent-mother's visitation to the guardian of the juveniles. There, the visitation order provided:

> Visits shall occur unsupervised for four hours a week upon leaving the Daybreak program provided [the r]espondent-mother tests negative and there is *no concern* she is using. She should not leave the children alone with anyone else during visitation, unless it is with a family member. Visits can become longer and more frequent with every six months of clean time outside the program. Visits should return to supervised or be suspended if [the r]espondent-mother tests positive for illegal substances,

> if there is *concern* she is using, or if there is *concern* for discord between [the r]espondent-mother and the children's father during visits.

Id. at 399–400, 829 S.E.2d at 495 (emphasis in original) (brackets omitted). Explaining that the visitation order "leaves [the r]espondent-mother's visitation to the discretion of the guardians based on their 'concerns[,]' " this Court vacated the order because it "improperly delegate[d] the court's judicial function to the guardians by allowing them to unilaterally modify [the r]espondent-mother's visitation." *Id.* at 400, 829 S.E.2d at 495 (citations omitted).

In the present case, as in *C.S.L.B.*, the trial court delegated the judicial function of determining Respondent's visitation plan to the children's guardian. *Id.* Although DSS is correct that the provision did not explicitly authorize the grandmother to terminate or suspend Respondent's visitation, the trial court did delegate to the grandmother the power "to unilaterally modify" Respondent's visitation. *Id.* at 400, 829 S.E.2d at 495 (citations omitted). As a result, we must vacate and remand this provision of the permanency planning order and guardianship order.

III. Conclusion

For the reasons discussed above, we remand the permanency planning order to the trial court to make sufficient written findings of fact to demonstrate Respondent's waiver of court-appointed counsel was knowing and voluntary. Further we vacate and remand the provision in the permanency planning order and the guardianship order granting the grandmother discretion over Respondent's visitation with the children.

REMANDED IN PART; VACATED AND REMANDED IN PART.

Judges DIETZ and COLLINS concur.

IN RE V.M.

[273 N.C. App. 294 (2020)]

IN THE MATTER OF V.M.

No. COA19-1028

Filed 1 September 2020

Child Abuse, Dependency, and Neglect—adjudication—neglect—accidental child intoxication—sufficiency of findings—cursory analysis

After a four-month-old baby was hospitalized for acute alcohol intoxication as a result of drinking baby formula that the mother prepared using one of the water bottles that her relatives had used to store alcohol at a family gathering, an order adjudicating the infant as neglected was reversed and remanded for further findings. The trial court did not find that the mother knew or reasonably could have discovered that the water bottle contained alcohol, or that her baby suffered "some physical, mental, or emotional impairment" or a substantial risk thereof; instead, the court based its adjudication on a conclusory analysis.

Judge ARROWOOD dissenting.

Appeal by respondent-mother from orders entered 22 May 2019 and 6 August 2019 by Judges Tiffany M. Whitfield and Cheri Siler-Mack, respectively, in Cumberland County District Court. Heard in the Court of Appeals 10 June 2020.

Cumberland County Department of Social Services, by Michael A. Simmons, for petitioner.

Benjamin J. Kull for respondent-mother.

Alston & Bird LLP, by Ryan P. Ethridge, for the Guardian ad Litem.

YOUNG, Judge.

Respondent-mother appeals from the trial court's order adjudicating V.M. ("Vinny")[1] neglected under N.C. Gen. Stat. § 7B-101(15) and ordering respondent-mother and respondent-father (collectively, "respondent-parents") to submit to random drug screens. After careful review, we reverse and remand.

1. A pseudonym is used to protect the juvenile's identity and for ease of reading.

I. Background

This action arises out of a Cumberland County Department of Social Services ("DSS") report concerning Vinny, who was admitted to the hospital with a blood alcohol level of 179 and diagnosed with acute alcohol intoxication. Respondent-parents are the biological parents of Vinny, who was four months old at the time of the incident at issue. The events leading up to the incident are as follows.

Respondent-mother is a stay-at-home mom and the primary caretaker of Vinny. In January 2019, respondent-mother took Vinny with her to Atlanta, Georgia for an aunt's funeral. Respondent-father was unable to accompany them on the trip due to a work conflict. Following the funeral service on Friday, 25 January 2019, respondent-mother and other family members gathered at a cousin's house, which had a full bar. While there, some members of the family began drinking. Respondent-mother and her brother, Domico, did not participate in the drinking, but were present in the home while the drinking took place. At some point, some of the family members who were drinking, including respondent-mother's sister Selenia, transferred the liquor into water bottles. Respondent-mother, Vinny, and Domico later spent the night at an Airbnb with Selenia.

The next morning, the group returned to their cousin's home to pick up their grandmother, who was going to ride back to North Carolina with Domico, respondent-mother, and Vinny. Before leaving, Domico grabbed some water bottles that he believed were unopened from the kitchen counter of their cousin's home. During the car ride back to North Carolina, respondent-mother fed Vinny formula that she prepared using one of the water bottles. Domico testified that throughout this process he did not detect the smell of alcohol in the car. Vinny subsequently became fussy. Despite respondent-mother's attempts to console him, Vinny remained fussy even after they arrived home. Throughout all relevant times, Vinny was primarily in the care of respondent-mother.

Respondent-mother took Vinny to the hospital the next morning, where doctors determined he had alcohol in his system and diagnosed him with acute alcohol intoxication. After speaking with his sister about the situation, Domico smelled the water bottle respondent-mother had used to prepare Vinny's formula and detected an odor of alcohol. Domico then realized he must have mistakenly grabbed one of the water bottles containing liquor from their cousin's house, which respondent-mother later used to prepare Vinny's formula. The matter was referred to DSS, and Vinny was temporarily placed in the care of his

paternal grandparents on 29 January 2019. Respondent-parents cooperated with DSS and worked to satisfy the agency's requirements.

On 18 February 2019, DSS filed a juvenile petition alleging that Vinny was neglected, dependent, and abused. DSS also made an ex parte request for non-secure custody of Vinny. The trial court denied this request, with the requirement that Vinny remain placed in the care of his paternal grandparents. On 22 May 2019, the trial court adjudicated Vinny to be a neglected juvenile but dismissed the allegations of abuse and dependency. The trial court also ordered that Vinny be returned to the care of respondent-parents and required respondent-parents to submit to two random drug screens. On 12 June 2019, the trial court held a full dispositional hearing. The trial court found that there were no safety concerns with respondent-parents, and on 6 August 2019, ordered that Vinny remain in the home of respondent-parents. The trial court further ordered that respondent-parents submit to additional random drug screens, following their admission that if tested that day they would test positive for marijuana. Respondent-mother timely filed notice of appeal on 5 September 2019.

II. Standard of Review

"The role of this Court in reviewing a trial court's adjudication of neglect . . . is to determine '(1) whether the findings of fact are supported by "clear and convincing evidence," and (2) whether the legal conclusions are supported by the findings of fact[.]' " *In re T.H.T.*, 185 N.C. App. 337, 343, 648 S.E.2d 519, 523 (2007) (quoting *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000)), *aff'd as modified*, 362 N.C. 446, 665 S.E.2d 54 (2008). "If such evidence exists, the findings of the trial court are binding on appeal, even if the evidence would support a finding to the contrary." *Id.* "We review a trial court's conclusions of law *de novo*." *In re J.R.*, 243 N.C. App. 309, 312, 778 S.E.2d 441, 443 (2015).

III. Analysis

In her first assignment of error, respondent-mother contends that the trial court erred in adjudicating Vinny a neglected juvenile. We agree.

Pursuant to N.C. Gen. Stat. § 7B-101(15) (2019), a neglected juvenile is:

> Any juvenile less than 18 years of age . . . whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; or who has been abandoned; or who is not provided necessary medical care; or

> who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare . . . .

"In general, treatment of a child which falls below the normative standards imposed upon parents by our society is considered neglectful." *In re Thompson*, 64 N.C. App. 95, 99, 306 S.E.2d 792, 794 (1983). However, not every act of negligence on part of the parent results in a neglected juvenile. *In re Stumbo*, 357 N.C. 279, 283, 582 S.E.2d 255, 258 (2003). "In order to adjudicate a juvenile neglected, our courts have additionally 'required that there be some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide "proper care, supervision, or discipline." ' " *Id.* (quoting *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-902 (1993)). Generally, North Carolina courts have found neglect where "the conduct at issue constituted either severe or dangerous conduct or a pattern of conduct either causing injury or potentially causing injury to the juvenile." *Id.*

A. Finding of Fact 16

In the trial court's order, it states, "the Court, after reviewing the evidence, record, testimony and arguments presented, makes the following findings by clear, cogent and convincing evidence" and lists facts numbered one through twenty. Of those twenty findings of fact numbers 16 and 18 are at issue. The trial court's finding of fact 16 states, in pertinent part, as follows:

> a. Respondent Mother stated that the child was primarily in her care on 1/25/19 and 1/26/19; however, the child was in the presence of other adults during that time frame. That by admission via testimony of the parties, there was alcohol being placed in water bottles. That the mother, along with the child, and at least two additional adults traveled from the State of Georgia to the State of North Carolina while preparing a bottle for the minor child with a water bottle removed from the previous overnight stay.
>
> b. That the maternal uncle stated that upon returning to the vehicle after the child was admitted to the hospital, he retrieved a water bottle from the backseat, and placing it to his nose, he could smell the odor of alcohol.

c. That Respondent Parents have made no attempts to remove the child from the paternal grandparents' care and physical custody.

Respondent-mother concedes the majority of the substance of this finding. Respondent-mother concedes that Vinny was primarily in her care; that alcohol was placed into the bottles on Friday, 25 January 2019; that respondent-mother, her brother, and their grandmother traveled from Georgia to North Carolina; and that Domico, after Vinny was admitted to the hospital, discovered the smell of alcohol in one of the bottles. Respondent-mother does take issue with particular details of these findings – that it was not "the parties" but respondent-mother's brother and sister who testified; that the evidence only supported a determination that alcohol was placed in bottles on Friday, 25 January 2019, and not any other day; that the evidence did not support a determination that respondent-mother returned to North Carolina with anyone other than Vinny, Domico, and her grandmother – but she does not challenge the fundamental determinations raised therein.

We likewise hold that there was evidence to support the thrust of each of these findings in turn. They are, ultimately, a factual recitation of the events of that day. The issue is not with finding of fact 16, but with the conclusion of law derived therefrom.

B. Finding of Fact 18

Respondent-mother contends that finding of fact 18 is actually a conclusion of law. We agree.

As a general rule, "[t]he labels 'findings of fact' and 'conclusions of law' employed by the lower tribunal in a written order do not determine the nature of our standard of review." *In re Estate of Sharpe*, 258 N.C. App. 601, 605, 814 S.E.2d 595, 598 (2018). Thus, "[i]f the lower tribunal labels as a finding of fact what is in substance a conclusion of law, we review that 'finding' as a conclusion *de novo*." *Id.*

The trial court's finding of fact 18 states, in pertinent part, that:

> Based on the foregoing findings of fact, the Court finds that the juvenile [Vinny] was a neglected juvenile, within the meaning of N.C. Gen. Stat. § 7B-101(15), in that at the time of the filing of the Petition, the juvenile did not receive proper care, supervision, or discipline from the juvenile's parent, custodian, or caretaker and the juvenile lived in an environment injurious to the juvenile's welfare because Respondent Mother allowed the child to be in

> an environment in which alcohol was being poured into water bottles and the juvenile later tested positive for a high level of alcohol and was subsequently diagnosed with acute alcohol intoxication. That the acute alcohol intoxication occurred as a result of Respondent Mother using a water bottle containing alcohol to make a bottle of formula for the child. . . .

"The classification of a determination as either a finding of fact or a conclusion of law is admittedly difficult. As a general rule, however, any determination requiring the exercise of judgment, or the application of legal principles, is more properly classified a conclusion of law." *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (citations omitted). The first sentence of finding of fact 18 applies the facts of the case to the statutory definition of "neglected juvenile" and, through that reasoning, reaches a conclusion that Vinny is neglected. Consequently, this is more of a conclusion of law rather than a finding of fact. Indeed, this Court has held that determinations that a juvenile is neglected are "more properly designated conclusions of law and we treat them as such for the purposes of . . . appeal." *Id.*

As finding of fact 18, inasmuch as it determines Vinny's status as a neglected juvenile, is more properly considered a conclusion of law, we review it *de novo*, to determine whether it is supported by the findings of fact. *J.R.*, 243 N.C. App. at 312, 778 S.E.2d at 443. It is here that the trial court's analysis falters.

The trial court did not find that respondent-mother knew, or even reasonably could have discovered, the danger of alcohol in the bottles. The trial court did not find that respondent-mother's behavior fell "below the normative standards imposed upon parents by our society." Perhaps most glaringly, the trial court did not find that Vinny suffered "some physical, mental, or emotional impairment," or that there was a substantial risk of the same.

Instead, the trial court summarily found that Vinny "did not receive proper care, supervision, or discipline from [his] parent . . . and [that he] lived in an environment injurious to [his] welfare" based solely on the fact that (1) Vinny was in an environment where alcohol was being poured into water bottles, and (2) Vinny was subsequently diagnosed with acute alcohol intoxication. In short, the trial court made a leap of logic which it did not adequately explain, and which this Court does not follow.

To be clear, we do not hold that the trial court could not have concluded that Vinny was neglected. Had the court engaged in more detailed analysis, offered additional factual findings, explained what steps respondent-mother could or should have taken, determined that the danger was in some way foreseeable, or even just offered more than a token conclusion, we might be able to uphold such a determination. But the analysis in this case was cursory and conclusory, at best. The findings, such as they are, support a determination that a tragic and unfortunate accident occurred here – an accident which might have been preventable with the benefit of hindsight, but which respondent-mother had no way of knowing would occur, nor any means to prevent it, absent some form of precognition. The trial court's analysis is simply too cursory to be permitted to stand.

Upon our *de novo* review, we hold that the findings of fact in the trial court's order do not support its conclusion of law that Vinny is a neglected juvenile. Accordingly, we remand this order to the trial court. On remand, the trial court shall either make additional appropriate findings of fact, not inconsistent with this opinion, to support its conclusion, or properly comport its conclusion to fit the findings it has already made.

Because we reverse and remand the trial court's order, we need not address the remainder of respondent-mother's arguments.

REVERSED AND REMANDED.

Judge DILLON concurs.

Judge ARROWOOD dissents in separate opinion.

ARROWOOD, Judge, dissenting.

I respectfully dissent from the majority's holding reversing the trial court's adjudication of neglect. While the majority asserts the trial court's findings of fact do not support its conclusion of law that Vinny is a neglected juvenile, I would hold the trial court did make sufficient findings to support its conclusion.

As the majority correctly notes, "[i]n general, treatment of a child which falls below the normative standards imposed upon parents by our society is considered neglectful." *In re Thompson*, 64 N.C. App. 95, 99, 306 S.E.2d 792, 794 (1983). "In order to adjudicate a juvenile neglected, our courts have additionally 'required that there be some physical, mental, or emotional impairment of the juvenile or a substantial risk

of such impairment as a consequence of the failure to provide "proper care, supervision, or discipline." ' " *In re Stumbo*, 357 N.C. 279, 283, 582 S.E.2d 255, 258 (2003) (quoting *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-902 (1993)). Generally, North Carolina courts have found neglect where "the conduct at issue constituted either severe or dangerous conduct or a pattern of conduct either causing injury or potentially causing injury to the juvenile." *Id.*

Here, in its finding of fact 18, the trial court found, in pertinent part, that:

> Based on the foregoing findings of fact, the Court finds that the juvenile [Vinny] was a neglected juvenile, within the meaning of N.C. Gen. Stat. § 7B-101(15), in that at the time of the filing of the Petition, the juvenile did not receive proper care, supervision, or discipline from the juvenile's parent, custodian, or caretaker and the juvenile lived in an environment injurious to the juvenile's welfare because Respondent Mother allowed the child to be in an environment in which alcohol was being poured into water bottles and the juvenile later tested positive for a high level of alcohol and was subsequently diagnosed with acute alcohol intoxication. That the acute alcohol intoxication occurred as a result of Respondent Mother using a water bottle containing alcohol to make a bottle of formula for the child. During the time that the juvenile obtained alcohol in his system, he was in the exclusive care of Respondent Mother. . . .

The majority asserts that finding of fact 18 is more properly considered a conclusion of law, and is thus subject to *de novo* review. "Under a *de novo* review, [this Court] considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *In re A.K.D.*, 227 N.C. App. 58, 60, 745 S.E.2d 7, 8 (2013) (quotation marks and citation omitted). Though the majority contends finding of fact 18 is not supported by the trial court's other findings, I disagree.

The trial court made several findings leading up to its finding of fact 18, including the following:

> 15. That the Petitioner, the Guardian ad Litem, Respondent Mother, and Respondent Father made certain admissions of fact after having ample opportunity to consult with their respective counsel. That a written copy

of those admissions was tendered to the Court. That those admissions are as follows:

a. *The Cumberland County Department of Social Services (CCDSS) received a Child Protective Services (CPS) referral on 01/27/2019 concerning the safety of the juvenile[].*

b. *On 01/27/19, Respondent Mother took the child to Cape Fear Valley Medical Center stating that the child had been fussing a lot.*

c. *On 1/27/19, the child tested positive for alcohol; his ethanol level was 242 mg/dl. The child was tested a second time and his blood alcohol level was 179. The child was diagnosed with acute alcohol intoxication.*

d. *Respondent Mother stated that the child was primarily in her care on 1/25/19 and 1/26/19.*

. . . .

16. That the Court made the additional finding of facts by clear, cogent, and convincing evidence as it relates to the verified Petition filed on February 18, 2019 and sworn testimony provided before the Court on today's date:

d. *Respondent Mother stated that the child was primarily in her care on 1/25/19 and 1/26/19; however, the child was in the presence of other adults during that time frame. That by admission via testimony of the parties, there was alcohol being placed in water bottles. That the mother, along with the child, and at least two additional adults traveled from the State of Georgia to the State of North Carolina while preparing a bottle for the minor child with a water bottle removed from the previous overnight stay.*

e. *That the maternal uncle stated that upon returning to the vehicle after the child was admitted to the hospital, he retrieved a water bottle from the backseat, and placing it to his nose, he could smell the odor of alcohol.*

f. *That Respondent Parents have made no attempts to remove the child from the paternal grandparents' care and physical custody.*

(emphasis in original). In finding of fact 18, the trial court summarized its findings in findings of fact 15 and 16 and applied the law to those facts in order to reach its determination that Vinny was a neglected juvenile. The majority acknowledges the trial court's finding of fact 16 is supported by the evidence. However, it then proceeds to hold that finding of fact 18, which is based on finding of fact 16 and several of the trial court's other findings, is not supported by sufficient findings.

The majority appears to take issue with the fact that, in its view, the trial court did not make certain findings, including that: (1) respondent-mother knew, or even reasonably could have discovered, the danger of alcohol in the bottles; (2) respondent-mother's behavior fell "below the normative standards imposed upon parents by our society[;]" and (3) Vinny suffered "some physical, mental, or emotional impairment," or that there was a substantial risk of same. The majority further insists that, "[h]ad the court engaged in more detailed analysis, offered additional factual findings, explained what steps respondent-mother could or should have taken, determined that the danger was in some way foreseeable, or even just offered more than a token conclusion, [it] might be able to uphold such a determination." However, this Court has made clear that, in determining whether a juvenile is neglected, a parent's fault or culpability is not a determinative fact. *In re A.L.T.*, 241 N.C. App. 443, 451, 774 S.E.2d 316, 321 (2015). In addition, contrary to the majority's assertions, the trial court's findings make clear that respondent-mother's oversight led to four-month old Vinny needing to be hospitalized and treated for acute alcohol intoxication. The evidence in the record also supports this.

Respondent-mother's brother and sister both testified that family members, including respondent-mother's sister, were drinking liquor and pouring it into water bottles on Friday during a family gathering at their cousin's house. Respondent-mother, who was taking care of Vinny, was also present at the gathering while these activities were taking place. The next day, on the drive home from the environment in which alcohol had been poured into water bottles, respondent-mother fed Vinny formula she prepared using a water bottle taken from such environment. Due to respondent-mother's conduct, four-month old Vinny suffered some physical impairment or injury, namely, acute alcohol intoxication. Notably, when respondent-mother's brother smelled the water bottle in question, he was able to detect the odor of alcohol. Had

respondent-mother been more attentive, she likely would have noticed that the water bottle had already been tampered with and its contents smelled like alcohol. Ultimately, this mistake "constituted either severe or dangerous conduct" which "caus[ed] injury . . . to the juvenile[,]" supporting a finding of neglect. *In re Stumbo*, 357 N.C. at 283, 582 S.E.2d at 258.

In finding of fact 18, the trial court's logical reasoning is clear as it applies the law to the facts gleaned from its previous findings to determine that Vinny was a neglected juvenile. I would thus hold that finding of fact 18 is supported by the evidence and the trial court's evidentiary findings, and would affirm the trial court's adjudication of neglect.

I would further hold that the trial court did not abuse its discretion in its dispositional order. Respondent-mother asserts the trial court abused its discretion when it ordered respondent-parents to submit to random drug screens and a substance abuse assessment. Pursuant to N.C. Gen. Stat. § 7B-904(d1)(3) (2019), "[a]t the dispositional hearing or a subsequent hearing, the court may order the parent . . . [to] [t]ake appropriate steps to remedy conditions in the home that led to or contributed to the juvenile's adjudication." The trial court may also within its discretion order the parent to "undergo psychiatric, psychological, or other treatment or counseling directed toward remediating or remedying behaviors or conditions that led to or contributed to the juvenile's adjudication." N.C. Gen. Stat. § 7B-904(c). "For a court to properly exercise the authority permitted by this provision, there must be a nexus between the step ordered by the court and a condition that is found or alleged to have led to or contributed to the adjudication." *In re T.N.G.*, 244 N.C. App. 398, 408, 781 S.E.2d 93, 101 (2015) (citation omitted). This includes "order[ing] services which could aid 'in both understanding and resolving the possible underlying causes' of the actions that contributed to the trial court's removal [or adjudication]." *Matter of S.G.*, __ N.C. App. __, __, 835 S.E.2d 479, 486 (2019) (quoting *In re A.R.*, 227 N.C. App. 518, 522, 742 S.E.2d 629, 632-33 (2013)).

Though respondent-mother argues the trial court abused its discretion because there was no evidence of a history of substance abuse or a drug-related parenting problem, I disagree. The day after Vinny was diagnosed with acute alcohol intoxication, respondent-parents tested positive for marijuana. Based on these facts, the trial court in its adjudication order exercised its discretion to order respondent-parents to submit to two random drug screens. Respondent-parents tested negative for those two tests, but refused to submit to a third. At the full dispositional hearing, respondent-parents admitted that if tested that day, they would

test positive for marijuana. DSS then requested custody of the juvenile based on respondent-parent's admissions to testing positive for illegal substances. The trial court denied the motion; however, evidently sensing a problem with respondent-parents' inability to remain drug-free throughout the adjudication and disposition process, it pleaded with respondent-parents to "[j]ust don't smoke anymore for the next little bit," so that their case could be closed. Because respondent-parents admitted they would test positive for marijuana, and in light of the adjudication of neglect involving use of another intoxicant, I would hold the trial court's order requiring respondent-parents to submit to additional drug screens and another substance abuse assessment was not "so arbitrary that it could not have been the result of a reasoned decision." *In re T.N.G.*, 244 N.C. App. at 408, 781 S.E.2d at 100 (citations omitted). I therefore respectfully dissent.

BRENTLEY ALLEN JACKSON, PLAINTIFF
v.
KELLIE LYNN JACKSON (NOW CLELLAND), DEFENDANT

No. COA19-259

Filed 1 September 2020

Civil Procedure—Rule 60(b) relief—prior order contrary to law—improper remedy

The trial court erred by entering a Civil Procedure Rule 60(b) order to relieve a parent from the child support provisions of the court's prior custody order where the Rule 60(b) order found that the prior order was rendered contrary to law (because the prior order did not contain the required findings of fact). Erroneous orders may be addressed only by timely appeal.

Judge BERGER concurring in result only.

Appeal by Defendant from orders entered 31 August 2018 and 10 October 2018 by Judge William B. Sutton, Jr. in Sampson County District Court. Heard in the Court of Appeals 4 September 2019.

Benjamin Lee Wright for plaintiff-appellee.

Gregory T. Griffin for defendant-appellant.

MURPHY, Judge.

Rule 60 is an improper method to remedy erroneous orders, which are properly addressed only by timely appeal. As a result, the trial court erred when it entered a Rule 60(b) order to relieve Plaintiff from the provisions of its prior custody order that, as theorized by the Rule 60(b) findings of fact, erroneously contained child support obligations. We vacate and remand.

BACKGROUND

On 29 January 2016, Plaintiff-Appellee Brentley Allen Jackson ("Plaintiff") filed his *Complaint for Divorce from Bed and Board, Child Custody, and Child Support*. Defendant-Appellant Kellie Lynn Jackson (now Clelland; "Defendant") timely answered and counterclaimed, and a hearing was held on the issue of custody on 3-4 August 2017. As a result of the hearing, a custody order ("the Custody Order") was entered by the trial court on 5 September 2017. The Custody Order decreed, in relevant part:

> Plaintiff shall reimburse Defendant for travel to and from preschool and school and shall receive a credit for any trips he has to make to Fayetteville for custody exchanges and return at the same rate of reimbursement. The reimbursement rate shall be the rate given to State Employees for travel and the mileage will be from 118 Hay Street to the preschool or school or lesser mileage if Defendant moves her residence closer to the schools.

Plaintiff pursued no appeal from the Custody Order. Nor did Plaintiff pay Defendant for her travel in accordance with the Custody Order.

Eight months later, in June 2018, Defendant filed a *Motion to Show Cause* requesting that Plaintiff be held in civil contempt for violating the payment provision of the Custody Order. Plaintiff responded with a *Motion for Relief from Order and/or Modification of Order*, which asked the trial court to void the provision of the Custody Order requiring him to pay travel expenses. In relevant part, Plaintiff's motion argued:

> 5. That at the hearing on [3-4 August 2017] neither the Plaintiff nor the Defendant offered evidence as to their respective incomes nor the cost of sending the minor child to Grace Preschool.
>
> . . .

> WHEREFORE, the Plaintiff prays the Court as follows:
>
> 1. That the Plaintiff be relieved of the child support provisions of the [Custody Order] pursuant to Rule 60(b)(1) in that the provisions concerning reimbursement and payment of daycare amount to a child support order and were entered by mistake in that the Court did not have facts in evidence to support a child support award because neither party offered evidence on the issue.
>
> . . .
>
> 3. That in the alternative, the Plaintiff be relieved of the provisions of the [Custody Order] pursuant to Rule 60(b)(6) in that there are no findings of fact regarding the incomes of the parties in said order, the cost of pre-school and health insurance and the provisions concerning reimbursement and payment of daycare are not supported by evidence and Plaintiff has a meritorious defense to the entry of such provisions and his rights have been injuriously affected by the [Custody] Order.

The following week, Defendant moved to dismiss Plaintiff's motion.

On 13 August 2018, the trial court heard Plaintiff's motion and entered an order ("the Rule 60(b) Order") stating in relevant part:

> **FINDINGS OF FACT**
>
> 1. This action was tried before the Court on [3 and 4 August 2017] and [the Custody] Order was entered on [5 September 2017].
>
> 2. That the Court required the Plaintiff to pay the cost of preschool and school and reimburse the Defendant for travel to and from preschool and school, receive a credit for any trips he made to Fayetteville, North Carolina for custody exchanges and gave reimbursement to Defendant at the rate given to state employees for travel and the mileage for 118 Hay Street, Fayetteville, North Carolina to the school the child attended.
>
> 3. That the Court did made no [sic] findings as to the income of the Plaintiff or the Defendant in [the Custody] Order, nor did it make findings as to the cost of preschool and school, or health insurance for the minor child and no evidence was presented on those issues by either parties [sic].

4. That the [Custody] Order requiring the Plaintiff to reimburse the Defendant for travel cost is not supported by findings of fact.

5. That the Court therefore, is setting aside [the Custody Order] and substituting therefore the order set forth herein in lieu thereof.

CONCLUSIONS OF LAW

1. That the [Custody] Order of [5 September 2017] should be set aside and an appropriate Order substituted therefore based upon the Court's findings, pursuant to:

a. Rule 60(b)(5) in that it is no longer equitable that the [Custody] Order should have prospective application; and

b. Rule 60(b)(6) in that the [Custody O]rder is irregular because it did not make findings as to the parties incomes [sic], cost of insurance and daycare and ordered the Plaintiff to make reimbursements to Defendant without determining the parties['] ability to pay.

2. That the rights of the Movant have been injuriously affected and the movant [sic] has shown a meritorious defense.

3. That the Defendant's Motion for Contempt against the Defendant [sic] has been rendered moot and therefore her motion for contempt should be dismissed.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED:

1. That the [Custody] Order entered in this cause on [5 September 2017] is set aside and the Court is substituting therefore the following Order: . . .

The Rule 60(b) Order is almost identical to the Custody Order, but omits the section about travel reimbursement, and was entered without an additional evidentiary hearing.

In response to the Rule 60(b) Order, Defendant moved for a new trial, arguing the trial court lacked authority to issue a new custody order without making new findings or conducting a new evidentiary hearing. On 10 October 2018, the trial court denied Defendant's *Motion for New Trial*, and Defendant filed timely notice of appeal.

ANALYSIS

Rule 60(b) states in relevant part:

> (b) . . . On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (5) . . . it is no longer equitable that the judgment should have prospective application; or
>
> (6) Any other reason justifying relief from the operation of the judgment.
>
> The motion shall be made within a reasonable time . . . . A motion under this section does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment, order, or proceeding shall be by motion as prescribed in these rules or by an independent action.

N.C.G.S. § 1A-1, Rule 60(b)(5)-(6) (2019).

"[A] motion under [N.C.]G.S. [§] 1A-1, Rule 60(b) of the Rules of Civil Procedure cannot be used as a substitute for appellate review." *Town of Sylva v. Gibson*, 51 N.C. App. 545, 548, 277 S.E.2d 115, 117 (1981) (citing *O'Neill v. Bank*, 40 N.C. App. 227, 231, 252 S.E.2d 231, 234 (1979); *In re Snipes*, 45 N.C. App. 79, 81, 262 S.E.2d 292, 294 (1980); 2 McIntosh, N.C. Practice and Procedure § 1720 (Supp. 1970)).[1]

"An erroneous judgment is one rendered contrary to law. . . . [It] must remain and have effect until by appeal to a court of [appeals] it shall be reversed or modified." *Young v. State Farm Mut. Auto. Ins. Co.*,

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1. *Town of Sylva* was specifically concerned with Rule 60(b)(6), which would render its more general holding on Rule 60(b) dicta. However, we have adopted the broader rule applying to all of Rule 60(b) in later cases. *See, e.g.*, *McKyer v. McKyer*, 182 N.C. App. 456, 642 S.E.2d 527, (2007); *Smith v. Johnson*, 125 N.C. App. 603, 481 S.E.2d 415, (1997); *Jenkins v. Middleton*, 114 N.C. App. 799, 443 S.E.2d 110. (1994); *Lang v. Lang*, 108 N.C. App. 440, 424 S.E.2d 190, (1993); *Chicopee, Inc. v. Sims Metal Works, Inc.*, 98 N.C. App. 423, 391 S.E.2d 211, (1990); *J. D. Dawson Co. v. Robertson Mktg., Inc.*, 93 N.C. App. 62, 376 S.E.2d 254, (1989); *Long v. Fink*, 80 N.C. App. 482, 342 S.E.2d 557, (1986); *Coleman v. Coleman*, 74 N.C. App. 494, 328 S.E.2d 871, (1985). Therefore, we apply *Town of Sylva's* holding to both Rule 60(b)(5) and 60(b)(6) in this case.

267 N.C. 339, 343, 148 S.E.2d 226, 229 (1966) (citing *Moore v. Humphrey*, 247 N.C. 423, 101 S.E.2d 460) (emphasis omitted). "An erroneous order is one 'rendered according to the course and practice of the court, but contrary to law, or upon a mistaken view of the law, or upon an erroneous application of legal principles.' . . . An erroneous order may be remedied by appeal; it may not be attacked collaterally." *Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 676, 360 S.E.2d 772, 777, (1987) (quoting *Wynne v. Conrad*, 220 N.C. 355, 360, 17 S.E.2d 514, 518 (1941)).

Here, Plaintiff's motion argued the trial court should relieve him of the child support provisions because "there are no findings of fact regarding the income of the parties in [the Custody Order], the cost of pre-school and health insurance and the provisions concerning reimbursement and payment of daycare are not supported by evidence" as "neither the Plaintiff nor the Defendant offered evidence as to their respective incomes nor the cost of sending the minor child to Grace Preschool." The trial court's Rule 60(b) Order cited Rule 60(b)(5) and Rule 60(b)(6) to relieve Plaintiff from the child support provisions based on Finding of Fact 3, which states the trial court "made no findings as to the income of the Plaintiff or the Defendant in [the Custody Order], nor did it make findings as to the cost of preschool and school, or health insurance for the minor child and no evidence was presented on those issues by either parties [sic]," and Finding of Fact 4, which states "the [Custody] Order requiring the Plaintiff to reimburse the Defendant for travel cost . . . [was] not supported by findings of fact."

Plaintiff's 60(b) motion and the Rule 60(b) Order describe a legal error in the Custody Order, rather than an irregularity. In Plaintiff's 60(b) motion, he argues there were no findings of fact, nor any facts in evidence, to support the child support provisions of the Custody Order, and as a result he should be relieved of the provisions related to child support. Similarly, the Rule 60(b) Order concludes the child support provisions in the Custody Order are unsupported by findings of fact in that order. The motion and order reflect that both Plaintiff and the trial court believed the Custody Order was "rendered contrary to law." *Young*, 267 N.C. at 343, 148 S.E.2d at 229. Thus, it was an erroneous order that could only be remedied by appeal, not by Rule 60(b). *Town of Sylva*, 51 N.C. App. at 548, 277 S.E.2d at 117.

Although not explicit in Plaintiff's Rule 60(b) motion or the Rule 60(b) Order, we interpret the comments about the child support provisions being unsupported by the evidence to be referring to N.C.G.S. § 50-13.4(c), which requires:

> Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case.

N.C.G.S. § 50-13.4(c) (2019); *see also Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980) ("Under [N.C.]G.S. [§] 50-13.4(c), . . . an order for child support must be based upon the interplay of the trial court's conclusions of law as to (1) the amount of support necessary to 'meet the reasonable needs of the child' and (2) the relative ability of the parties to provide that amount. These conclusions must themselves be based upon factual *findings* specific enough to indicate . . . that the judge below took 'due regard' of the particular 'estates, earnings, conditions, [and] accustomed standard of living' of both the child and the parents."). Based upon the findings of fact provided in the Rule 60(b) Order, the trial court relieved Plaintiff of the child support provisions ordered nearly a year earlier due to the failure of the earlier order to address "the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties." N.C.G.S. § 50-13.4(c) (2019). Absent the required findings, the earlier order was "rendered contrary to [N.C.G.S. § 50-13.4(c)]." *Young*, 267 N.C. at 343, 148 S.E.2d at 229. Such an erroneous order could only have been addressed by appeal, not by Rule 60(b). *Town of Sylva*, 51 N.C. App. at 548, 277 S.E.2d at 117.

Additionally, we interpret the aspects of Plaintiff's motion and the Rule 60(b) Order addressing findings of fact as referring to the requirement that:

> [w]here, as here, the trial court sits without a jury, the judge is required to find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment. . . . The purpose of the requirement that the court make findings of those specific facts which support its ultimate disposition of the case is to allow a reviewing court to determine from the record whether the judgment—and the legal conclusions which underlie it—represent a correct application of the law. The requirement for appropriately detailed findings is thus not a mere formality or a rule of empty ritual; it is designed instead to dispose of the issues raised by the pleadings and to allow

> the appellate courts to perform their proper function in the judicial system.

Coble, 300 N.C. at 712, 268 S.E.2d at 188-189 (internal citations and quotation omitted). Again, the findings of fact in the Rule 60(b) Order show that the action being complained of was the entry of child support provisions that were "rendered contrary to law" as the Custody Order failed to include the required findings of fact to support its child support determination. Therefore, the trial court erred in using Rule 60(b) here to relieve Plaintiff of the child support obligations as the findings of fact in the Rule 60(b) Order described the Custody Order as an erroneous order. We vacate the Rule 60(b) Order as an impermissible remedy for an alleged erroneous order that could only be addressed by appeal. *Town of Sylva*, 51 N.C. App. at 548, 277 S.E.2d at 117.

CONCLUSION

The trial court impermissibly used Rule 60(b) to rectify what it described as an erroneous order that only could have been addressed by appeal and not by Rule 60(b). We vacate the Rule 60(b) Order. Defendant's remaining arguments on appeal are rendered moot and we do not address them. We remand this matter to the trial court for further proceedings, including a hearing on Defendant's *Motion for Contempt*.

VACATED IN PART; REMANDED IN PART.

Judge INMAN concurs.

Judge BERGER concurs in result only.

K2 ASIA VENTURES, PLAINTIFF
v.
KRISPY KREME DOUGHNUT CORPORATION, AND KRISPY KREME DOUGHNUTS, INC., DEFENDANTS

No. COA19-314

Filed 1 September 2020

Parties—real party in interest—breach of contract—business entity as plaintiff—different name in contract and complaint

In a breach of contract case between two business entities, the trial court properly dismissed plaintiff's lawsuit for failure to prosecute its claims in the name of a real party in interest, pursuant to Civil Procedure Rule 17(a), where plaintiff's registered corporate name differed from the names listed on the contract and in its complaint, but where plaintiff did not move to substitute itself as a party until nine years after filing suit and three years after defendant raised a clear objection on Rule 17 grounds. Further, plaintiff's argument that a corporate misnomer was insufficient to warrant dismissal was rejected where it presented no evidence that the plaintiff-entity named in the complaint even existed.

Appeal by plaintiff from order entered 13 November 2018 by Judge Anderson D. Cromer in Forsyth County Superior Court. Heard in the Court of Appeals 7 January 2020.

Broocks Law Firm, PLLC, by Ben C. Broocks, pro hac vice, and Blanco, Tackabery & Matamoros, P.A., by Chad A. Archer, and Peter J. Juran, for plaintiff-appellants.

Kilpatrick Townsend & Stockton LLP, by Adam H. Charnes, Jason M. Wenker, and Chris W. Haaf, for defendant-appellees.

BRYANT, Judge.

Where K^2 Asia Ventures failed to establish that it was a real party in interest, we affirm the trial court's 13 November 2018 order dismissing the action pursuant to Rules 17(a) and 41(b).

On 7 April 2009, in Forsyth County Superior Court, K^2 Asia Ventures ("K^2 Asia"), Ben C. Broocks, and James G.J. Crow filed a complaint (amended 7 February 2011) against Robert Trota; Veronica Trota; Joselito Saludo; Carolyn T. Salud; Roland V. Garcia; Cristina T. Garcia;

Jim Fuentebella; Mavis Fuentebella; Sharon Fuentebella; Max's Baclaran Inc.; Chickens R. Us, Inc.; Max's Makati Inc.; Max's Ermita, Inc.; Max's of Manila, Inc.; The Real American Doughnut Company Inc.; Trofi Ventures, Inc.; Ruby Investment Company Holdings, Inc.; Krispy Kreme Doughnut Corporation; and Krispy Kreme Doughnut, Inc. Broocks and Crow were the principals of K^2 Asia. K^2 Asia's company, whose principal place of business was in Austin, Texas, was founded to facilitate and promote the opening of Krispy Kreme Doughnuts franchises in Asia. Other than Krispy Kreme Doughnut Corporation and Krispy Kreme Doughnuts, Inc., ("Krispy Kreme"), a company whose principal place of business was in Winston-Salem, North Carolina, the other putative defendants were companies, company owners, or investment companies with business interests in the Philippines.

Per the amended complaint, K^2 Asia was founded with the objective of bringing Krispy Kreme's franchises to countries in Asia. Believing that Krispy Kreme would require a partnership with a fast-food business operator in each of the target countries, plaintiff contacted representatives of a restaurant group—Max's Group— in regard to potential operations in the Philippines. Max's Group was receptive to the prospect of partnering with Krispy Kreme. K^2 Asia enticed representatives of Krispy Kreme to travel to the Philippines and meet with representatives of Max's Group. K^2 Asia provided analysis concerning projected product pricing, product volumes, ingredient costs, sources for potential alternative ingredients, and potential franchise locations. K^2 Asia asserted that during negotiations, it was agreed that should a Krispy Kreme franchise be granted to Max's Group, K^2 Asia would receive a management fee of one percent (1%) of the gross revenue and a ten percent (10%) equity interest in the operations (with 5% received after the third year and 5% received after the fifth year). Moreover, K^2 Asia would be granted the right to acquire additional equity in exchange for contributing twenty-five percent (25%) of the budgeted capital requirements. In cooperation with Max's Group, K^2 Asia would be allowed to raise capital from outside investors. Eventually, Krispy Kreme granted K^2 Asia exclusive rights to negotiate agreements for franchise rights in the Philippines (the "K^2 Asia/Krispy Kreme Exclusivity Agreement"). Plans were developed to create a business entity known as "The Real American Doughnut Company, Inc." between Krispy Kreme, Max's Group, and K^2 Asia. Max's Group provided a "Memorandum of Understanding" ("MOU") which documented the agreement between K^2 Asia and Max's Group with regard to K^2 Asia's interest in the yet to be formed "The Real American Doughnut Company, Inc." The MOU recited the agreed-upon management fee (1%) but differed as to the previously agreed upon equity interest, which had

been ten percent (10%). The MOU stated that K² Asia's equity interest would be five percent (5%). It was also communicated that K² Asia need not immediately raise capital funds (which were to be in exchange for additional equity). Thereafter, Max's Group communicated that K² Asia would not be granted a management fee and would not receive any equity interest. K² Asia alleged that the decision to forego paying K² Asia the management fee and allowing K² Asia an equity interest was based on the recommendation of Krispy Kreme.

Krispy Kreme and Max's Group ultimately executed a development agreement and a franchise agreement for Krispy Kreme franchises in the Philippines. The franchise agreement listed the ownership interests in Krispy Kreme Philippines franchises. K² Asia did not receive an ownership interest. The Real American Doughnut Company, Inc., was formed, but K² Asia was not included as an interested party. K² Asia alleged that Krispy Kreme required that Max's Group periodically pay Krispy Kreme development fees, franchise fees, royalties, and other fees for each store; submit weekly sales reports for each store; submit annual development plans, sales forecasts, line item margin reviews, and marketing plans; and purchase certain mixes, products, equipment, and fixtures from Krispy Kreme. Representatives of Max's Group traveled to North Carolina for training with Krispy Kreme in July 2006 and for a franchise convention in 2007. K² Asia contended that Max's Group provided large monetary payments to Krispy Kreme and frequently communicated with representatives of Krispy Kreme regarding its ongoing business operations.

Per the complaint, K² Asia, Broock, and Crow sought to recover monetary damages from Krispy Kreme based on theories of breach of contract; intentional interference with a contractual relationship and/or prospective economic advantage; promissory estoppel; violation of principles of partnership, joint venture, and fiduciary duty; fraud, constructive fraud, and fraudulent inducement; unfair and deceptive trade practices; aiding and abetting breach of fiduciary duty; civil conspiracy; quantum meruit/unjust enrichment; and punitive damages.

Though the motions were not included in the record, court orders in the record state that Krispy Kreme moved to dismiss K² Asia's complaint. The trial court granted the motions in part. The court dismissed all claims asserted by individuals Broocks and Crow, as well as K² Asia's claims for fraud and unfair and deceptive trade practices against Krispy Kreme.

Krispy Kreme filed its answer to K² Asia's complaint on 11 April 2011.

Following a joint motion by Krispy Kreme and K^2 Asia, on 23 September 2011, then Chief Justice Sarah Parker designated this matter as exceptional and assigned it to the Honorable Anderson Cromer, Superior Court Judge.

On 7 May 2015, Krispy Kreme filed a motion for summary judgment. In its brief filed in support of its motion for summary judgment, Krispy Kreme references an order of the trial court entered on 26 July 2013. Per Krispy Kreme (and acknowledged by K^2 Asia) the trial court dismissed all non-resident defendants. Per Krispy Kreme, by the 26 July 2013 order, the court "reduced the case to a few remaining claims against Krispy Kreme by a purported company called 'K^2 Asia Ventures.' "

In its motion for summary judgment, Krispy Kreme contended that K^2 Asia lacked standing to bring a claim.

> 2. [K^2 Asia] is not an entity that signed the purported contracts at issue, and the entities that signed those contracts are not parties to the suit.
>
> 3. Further, there is no evidence that [K^2 Asia] exist[ed]. Indeed, there is no evidence that the entities that signed the purported contracts exist[ed].

More specifically, Krispy Kreme argued that the MOU—which documented the agreement between K^2 Asia and Max's Group with regard to K^2 Asia's interest in the then yet to be formed The Real American Doughnut Company, Inc.—was executed by "K^2 Asia Ventures, Ltd., a limited partnership, by K^2 Asia Management, LLC, general partner, by . . . Broocks, Member and Manager." Krispy Kreme points out that in the 26 July 2013 order, the trial court found "neither K^2 Asia Ventures, Ltd. nor K^2 Asia Management LLC [wa]s a named plaintiff in this civil action." As to K^2 Asia's claim against Krispy Kreme for breach of contract, Krispy Kreme argued that "the contract . . . which is referred to in the Amended Complaint as the 'Exclusivity Agreement'—also was executed by 'K^2 Asia Ventures, Ltd.' " Moreover, Krispy Kreme contended that the only evidence of the existence of K^2 Asia related to an entity named K^2 Asia Ventures G.P., a Cayman Island company, which was not a party to the civil suit. Krispy Kreme argued that it was entitled to summary judgment on all claims because K^2 Asia had failed to produce any evidence that it existed or had standing to bring the asserted claims.

On 28 May 2015, in response to Krispy Kreme's motion for summary judgment, K^2 Asia argued that it was a real party in interest.

- K^2 Asia Ventures is K^2 Asia Ventures G.P. [a Cayman Island company] and any failure to include the suffix "G.P." in the caption was a misnomer;
- K^2 Asia Ventures G.P. ratified the pre-incorporation [MOU], making it the proper party to sue on the claims that arise from such contract;
- K^2 Asia Ventures G.P. is K^2 Asia Ventures, Ltd.
- Krispy Kreme is judicially estopped from contending K^2 Asia is not the real party in interest because it has admitted that K^2 Asia exists and is the proper party to this litigation.

In all events, under North Carolina Rules of Civil Procedure and applicable case law, no action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest.

K^2 Asia further contended that the Certificate of Incorporation for K^2 Asia Ventures G.P., as well as a Memorandum & Articles of Association of K^2 Asia Ventures G.P., had been provided to Krispy Kreme. K^2 Asia acknowledged that at the time the MOU was executed, K^2 Asia Ventures Ltd. did not exist. Broock, president of K^2 Asia Ventures, "believed that he would, in the near future, create a company called K^2 Asia Ventures Ltd." Based on this belief, Broock drafted the K^2 Asia/Krispy Kreme Exclusivity Agreement using K^2 Asia Ventures Ltd. as the name of the party to the agreement. However, when the Cayman Island entity was created, it was incorporated as K^2 Asia Ventures G.P., rather than K^2 Asia Ventures Ltd. K^2 Asia further acknowledged that "no such entity with the name of K^2 Asia Ventures Ltd. was ever registered in the Cayman Islands." Yet, K^2 Asia argued that Krispy Kreme should be judicially estopped from arguing that K^2 Asia did not have standing. Alternatively, K^2 Asia argued that should the trial court rule K^2 Asia was not a real party in interest, "a trial court should either correct [K^2 Asia]'s error itself or refuse to hear the motion for summary judgment until the real party in interest is substituted for the plaintiff."

Over three years later, on 13 November 2018, the trial court entered its order on Krispy Kreme's motion for summary judgment. The court stated that it would not "substitute a party on its own motion or upon the invitation extended by [K^2 Asia] in its brief before the trial court." The court noted that the case had been pending since 2009 and that K^2 Asia had not filed a motion to substitute the Cayman Island company

named K^2 Asia Ventures G.P. as the real party in interest since 2009 or in the three years since Krispy Kreme raised a clear objection in 2015. The court found this delay not reasonable.

Considering Krispy Kreme's motion for summary judgment made pursuant to Rule 56 as a motion to dismiss pursuant to Rule 41(b),

> [t]he [c]ourt interprets Krispy Kreme's motion for summary judgment, described as a Rule 56 motion, as a motion for dismissal of the action brought by [K^2 Asia] for failure to prosecute or to comply with the rules of civil procedure, namely failure to comply with Rule 17(a) and prosecute its claims in the name of the real party in interest. As such, the [c]ourt treats [Krispy Kreme's] motion as one made under Rule 41(b). The [c]ourt finds and concludes that, based on the papers submitted and the protracted history of this case, K^2 Asia Ventures (nothing else appearing), is not the real party in interest. However, the case will be dismissed without prejudice. It is the [c]ourt's view that this result captures the spirit and letter of Rules 17(a) and 41(b) of the North Carolina Rules of Civil Procedure.

K^2 Asia appeals.

On appeal, K^2 Asia argues that the trial court erred by denying K^2 Asia's right to amend its complaint and failing to address the issue of misnomer.

Motion to Amend complaint

K^2 Asia argues that the trial court erred by denying its motion to amend the complaint to reflect the real party in interest. K^2 Asia contends that once Krispy Kreme moved for summary judgment on the basis that K^2 Asia was not the real party in interest, K^2 Asia moved the court to amend the complaint to reflect the real party in interest, but three years later, the trial court denied K^2 Asia's motion. We disagree.

> "[O]ur standard of review for motions to amend pleadings requires a showing that the trial court abused its discretion." *Delta Envtl. Consultants of N.C., Inc. v. Wysong & Miles Co.*, 132 N.C. App. 160, 165, 510 S.E.2d 690, 694 (1999). . . . Proper reasons for denying a motion to amend include undue delay, unfair prejudice, bad faith, futility of amendment, and repeated failure of the moving party to

> cure defects by other amendments. *Delta*, 132 N.C.App. at 166, 510 S.E.2d at 694.

Revolutionary Concepts, Inc. v. Clements Walker PLLC, 227 N.C. App. 102, 110, 744 S.E.2d 130, 136 (2013); *see also Key Risk Ins. Co. v. Peck*, 252 N.C. App. 127, 133–34, 797 S.E.2d 354, 358 (2017) ("Where a case is not brought by the real party in interest, it is within the discretion of the trial court to allow a motion to substitute under Rule 17(a)" (citation omitted)).

In *Revolutionary Concepts, Inc.*, 227 N.C. App. 102, 744 S.E.2d 130, this Court considered whether the trial court erred in failing to permit the plaintiff (a post-merger surviving corporation) to substitute itself as the real party in interest pursuant to Rule 17 for the previous merging corporation—which had been a real party in interest. Prior to the merger, the merging corporation filed a complaint and voluntarily dismissed its claims pursuant to Rule 41(a). After the voluntary dismissal but prior to the merger, the would-be surviving corporation timely re-filed the claims the merging corporation had voluntarily dismissed. But at that time, the would-be surviving corporation lacked standing to do so. For more than three years following the merger, the merger surviving corporation failed to take any action to assert its standing to bring the claims it had filed pre-merger on the basis that it was the survivor of the merging corporation—the real party in interest. "[W]ithout some action by [the surviving corporation] post-merger to assert those claims as the surviving entity of the merger, its claims brought in [pre-merger] do not automatically incorporate any claims [the merging corporation] could have brought but failed to do so simply by virtue of the merger." *Id.* at 110, 744 S.E.2d at 136. Thus, the trial court denied the merger surviving corporation's motion to substitute itself as the real party in interest pursuant to Rule 17. *Id.* at 112, 744 S.E.2d at 137.

On appeal, this Court held that it

> [could] discern no abuse of discretion in denying the Rule 17 motion because [the] plaintiffs could have substituted [the] post-merger [company] at any point after the August 2008 merger. However, they did not attempt to do so for over three years, until the hearing in January 2012. Although our Courts generally permit liberal amendment of pleadings, here, we believe that the trial court's decision to not allow [the] post-merger [plaintiff] to be substituted as the real party in interest at the summary judgment hearing does not constitute an abuse of discretion. [The

> p]laintiffs have failed to offer any compelling reason why they failed to do so in a reasonable time after the merger. . . . Therefore, we conclude that the trial court did not abuse its discretion in denying [the plaintiffs'] motion to substitute itself as the real party in interest pursuant to Rule 17.

Id.; *see also Street v. Smart Corp.*, 157 N.C. App. 303, 309, 578 S.E.2d 695, 700 (2003) (affirming a trial court's dismissal of an action where the record reflected no attempt or request by the plaintiff to substitute the real party in interest where the plaintiff "was aware of the real party in interest defense for approximately seven months before the hearing based on defendant's answer and for approximately three weeks based on the motion to dismiss"); *Narron v. Union Camp Corp.*, 81 N.C. App. 263, 269, 344 S.E.2d 64, 68 (1986) (upholding the trial court's dismissal of the action where the plaintiffs failed to prosecute their claims and the record reflected "a long history of foot-dragging by [the] plaintiffs").

Here, the record reflects that on 7 May 2015, Krispy Kreme filed its motion for summary judgment and a brief in support of said motion. Krispy Kreme contended that K^2 Asia lacked standing to bring the lawsuit because it was not a real party in interest in any of the claims asserted in the amended complaint. Moreover, K^2 Asia was not the entity which signed the K^2 Asia/Krispy Kreme Exclusivity Agreement or the MOU. In its brief, Krispy Kreme referenced the trial court's 26 July 2013 order in which the trial court made findings of fact that the MOU—which K^2 Asia had described as the agreement between K^2 Asia and Max's Group—was executed by "K^2 Asia Ventures, Ltd., a limited partnership, by K^2 Asia Management, LLC, general partner, by . . . Broocks, Member and Manager" and that "neither K2 Asia Ventures, Ltd. nor K2 Asia Management LLC [wa]s a named plaintiff in this civil action." As to K^2 Asia's claim(s) against Krispy Kreme based on the K^2 Asia/Krispy Kreme Exclusivity Agreement—which K^2 Asia described as the agreement in which Krispy Kreme granted K^2 Asia exclusive rights to negotiate agreements for franchise rights in the Philippines—Krispy Kreme argued that "the contract . . . which [wa]s referred to . . . as the 'Exclusivity Agreement'—also was executed by 'K^2 Asia Ventures, Ltd.' " Moreover, Krispy Kreme contended that the only evidence of the existence of K^2 Asia related to an entity named K^2 Asia Ventures G.P., a Cayman Island company, which was not a party to the civil suit. Krispy Kreme argued that it was entitled to summary judgment on all claims because K^2 Asia had failed to produce any evidence that K^2 Asia Ventures existed.

On 28 May 2015, K^2 Asia filed its brief in opposition to Krispy Kreme's motion for summary judgment. In pertinent part, K^2 Asia argued that if

the trial court determined that K² Asia was not a real party in interest, Krispy Kreme was still not entitled to summary judgment. K² Asia quoted General Statutes, section 1A-1, Rule 17(a), as follows: "***[n]o action shall be dismissed*** **on the ground that it is not prosecuted in the name of the real party in interest** ***until a reasonable time has been allowed after objection*** for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and ***such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest***." After stating that "the court should order a continuance" to allow the real party in interest a reasonable time to be brought in and plead, K² Asia asserted that

> [o]n a motion for summary judgment for lack of the real party in interest, a trial court should either correct [K² Asia]'s error itself or refuse to hear the motion for summary judgment until the real party in interest is substituted for the plaintiff.
>
> . . . .
>
> Therefore, even if the [c]ourt believes that K² Asia Ventures is not the real party in interest in this action, pursuant to Rule 17, it must permit [the real party in interest] to be substituted in.
>
> . . . .
>
> . . . [I]n the event that the [c]ourt finds that K² Asia Ventures is not the real party in interest, [K² Asia] respectfully reserves its right to substitute K² Asia Ventures G.P. as the real party in interest.

Over three years later, on 13 November 2018, the trial court entered its order in response to Krispy Kreme's motion for summary judgment. The court noted that Krispy Kreme's motion for summary judgment, filed 7 May 2015, raised the issue of what entity was the real party in interest; however, "[i]nterestingly, neither the named [K² Asia] nor Defendant [Krispy Kreme] have calendared the matter for hearing." The court summarized K² Asia's arguments in opposition to Krispy Kreme's motion as follows:

> o K² Asia Ventures is K² Asia Ventures G.P. [a Cayman Island company incorporated on 30 July 2004] and any failure to include the suffix "G.P." in the caption was a misnomer;

- o K^2 Asia Ventures G.P. ratified the pre-incorporation [MOU], making it the proper party to sue on the claims that arise from such contract;
- o K^2 Asia Ventures G.P. is K^2 Asia Ventures, Ltd.
- o Krispy Kreme is judicially estopped from contending K^2 Asia is not the real party in interest because it has admitted that K^2 Asia exists and is the property party to this litigation[.]

The court stated that upon its review of the arguments presented, "the primary basis for [K^2 Asia]'s argument that K^2 Asia Ventures is K^2 Asia Ventures G.P. and that K^2 Asia Ventures G.P. is K^2 Asia Ventures Ltd.; is 'it's because we say it is.' "

The court cited Rule 17 of our Rules of Civil Procedure.

> No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest."

N.C. Gen. Stat. § 1A-1, Rule 17(a) (2019).

In its order, the court stated that

> [it declines] to substitute a party on its own motion or upon the invitation extended by [K^2 Asia] in its brief. This case has been pending since 2009. [K^2 Asia] has not filed a motion to substitute the Cayman Island company named K^2 Asia Ventures G.P. as the real party in interest. However, [K^2 Asia] did . . . "reserve its right to substitute K^2 Asia Ventures G.P. as the real party in interest" in the event the [c]ourt found that K^2 Asia Ventures is not the real party in interest.
>
> It is not reasonable, in the [c]ourt's view or opinion, for [K^2 Asia] to wait more than nine years after [K^2 Asia]'s case was filed, and more than three years after a clear objection was voiced by [Krispy Kreme] that the case was not being prosecuted in the name of the real party in interest, to exercise its right to substitute the name of the real party in interest.

The court then stated that it interpreted Krispy Kreme's motion for summary judgment as a motion to dismiss the action for K² Asia's failure to prosecute or to comply with the Rules of Civil Procedure, namely Rule 17(a), and the failure to prosecute its claims in the name of the real party in interest. "The [c]ourt finds and concludes that, based on the paper submitted and the protracted history of this case, K² Asia Ventures (nothing else appearing), is not the real party in interest." The court elected to treat Krispy Kreme's motion for summary judgment as a Rule 41(b) motion for involuntary dismissal.

We hold that the trial court did not abuse its discretion by declining to *ex mero motu* substitute the real party in interest for K² Asia or by denying K² Asia's reservation of the right to substitute K² Asia Ventures G.P. as the real party in interest, where K² Asia failed to do so pursuant to Rule 17 over a three year period. Accordingly, on this argument, K² Asia is overruled.

Misnomer of a party

K² Asia argues that the trial court erred by failing to address the issue of misnomer of a party. We disagree.

K² Asia contends that there was never a question that it was incorporated in the Cayman Islands and asserts the following: "while in the [Exclusivity Agreement] [Broock] used 'K2 Asia Ventures **Ltd.**' instead of 'K2 Asia Ventures, **G.P.**,' " there is no indication Krispy Kreme was misled about the entity with which it was contracting. "[Though] the trial court concluded that the only way it could tell that K2 Asia Ventures, **Ltd.** is the same as K2 Asia Ventures **G.P.**, was because [Broock] said so. That is of course true, as no one can know my thoughts as to the use of the 'K2 Asia Ventures, Ltd.' as [Broock] did except [Broock]."

In essence, K² Asia argues that K² Asia Ventures, Ltd.—named in the Exclusivity Agreement with Krispy Kreme and the MOU with Max's Group—is not a registered corporation[1] but is the same entity as K² Asia Ventures G.P., which is a company registered in the Cayman Islands. K² Asia Ventures G.P. is the same entity as K² Asia—the named plaintiff in the current civil suit—and all three entities represent the real party in interest.

In support of its argument that corporate misnomers are insufficient to warrant dismissal of an action, K² Asia cites *Troy & N. Carolina*

1. In its brief to this Court, plaintiff asserts that Krispy Kreme reserved the name K² Asia Ventures Ltd. in the Cayman Islands before filing its motion for summary judgment.

Gold Mining Co. v. Snow Lumber Co., 170 N.C. 273, 277, 87 S.E. 40, 42 (1915) (reasoning that in the context of the transference of property by deed, "[a] misnomer does not vitiate [the deed], provided the identity of the corporation with that intended to be named by the parties is apparent"); and *Tomika Invs., Inc. v. Macedonia True Vine Pent. Holiness Ch. of God*, 136 N.C. App. 493, 524 S.E.2d 591 (2000) (discussing *Troy & N. Carolina Gold Mining Co.*, 170 N.C. 273, 87 S.E. 40). In reviewing "the disparity in the corporate name, our Supreme Court stated that '[a]s to the plaintiff being described by the wrong name in the deed, this is at most but a misnomer or latent ambiguity, which can be explained by parol evidence so as to fit the description to the person or corporation intended. . . . A corporate name is essential, but the inadvertent or mistaken use of the name is ordinarily not material if the parties really intended the corporation by its proper name.' " *Tomika Invs.*, 136 N.C. App. at 496, 524 S.E.2d at 594 (alterations in original) (citation omitted); *see also id.* at 497, 524 S.E.2d at 594 ("[T]here is only a latent ambiguity in the deed, and no evidence that [the] defendant was prejudiced by the misstatement of Tomika's corporate name. [The d]efendant knew it was dealing with a corporation named 'Tomika Investment' or 'Tomika Investments,' of which [the] defendant Latimer was President. Concurrently with the execution of the deed, Tomika executed a lease with option to buy to the defendant, and impressed its corporate seal bearing its correct corporate name on the lease. We hold that the error in designating the grantee in the deed from [the] defendant Macedonia was not sufficient to void the deed as a matter of law, and hold that the trial court correctly granted summary judgment on this issue.").

K^2 Asia's argument regarding misnomer of party names is well taken. There is no dispute that Krispy Kreme contracted with Broock's business entity or for that matter, that Max's Group contracted with Broock's business entity. However, Broock's business entity with which Krispy Kreme and Max's Group contracted is not the business entity Broock registered. Moreover, the business entity Broock registered is not the entity in the current civil suit named in the complaint as plaintiff, K^2 Asia. Nothing else appearing, for this Court to hold K^2 Asia to be a real party in interest, we would necessarily endorse the existence of a business entity for which there is no evidence of existence other than "because we say it is." We do not so hold. Therefore, K^2 Asia's argument, on this point, is overruled and the trial court's 13 November 2018 order is

AFFIRMED.

Judges ZACHARY and COLLINS concur.

SAULS v. BARBOUR

[273 N.C. App. 325 (2020)]

JOHN D. SAULS, ET AL., PLAINTIFFS
v.
ROBERT O. BARBOUR, ET AL., DEFENDANTS

No. COA19-1042

Filed 1 September 2020

1. Civil Procedure—motion for judgment on the pleadings—conversion to motion for summary judgment—affidavits—consideration by trial court

In an action concerning a dispute over an easement, defendants' submission of two affidavits opposing plaintiffs' motion for judgment on the pleadings did not convert the motion into one for summary judgment where nothing in the record indicated that the trial court considered the affidavits (which were materials outside the pleadings). Because the trial court considered only the pleadings, attachments, and arguments of counsel—and excluded the affidavits from consideration—the motion was not converted to one for summary judgment.

2. Easements—appurtenant—ingress and egress—identified in deeds and plats—motion for judgment on the pleadings

The trial court did not err by granting plaintiffs' motion for judgment on the pleadings in an action concerning a dispute over an easement where the recorded deeds and plats that were attached to the complaint sufficiently identified an appurtenant easement of ingress and egress ("30' INGRESS / EGRESS EASEM'T") across defendants' property.

Appeal by Defendants from order entered 11 July 2019 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 11 August 2020.

Ragsdale Liggett PLLC, by Amie C. Sivon and Matthew L. Hubbard, for Plaintiffs-Appellees.

Edmundson & Burnette, LLP, by James T. Duckworth, III, and Daniel R. Flebotte & Associates, PLLC, by Daniel R. Flebotte, for Defendants-Appellants.

COLLINS, Judge.

Defendants appeal from an order granting Plaintiffs' motion for judgment on the pleadings in their action to quiet title and for declaratory judgment that Plaintiffs have an appurtenant easement over Defendants' property. Defendants argue that the trial court erred because Defendants' submission of two affidavits opposing the motion converted the motion into one for summary judgment, there were material issues of fact that precluded the trial court from effectively granting summary judgment, and Plaintiffs are not entitled to an appurtenant easement as a matter of law. We affirm the order.

I. Procedural History

Plaintiffs brought an action in Wake County Superior Court on 24 August 2018 to quiet title and for declaratory judgment that Plaintiffs have an appurtenant easement of ingress and egress across Defendants' property. Plaintiffs attached to the complaint the recorded deeds and maps for both Plaintiffs' and Defendants' properties. Plaintiffs filed an amended complaint on 16 April 2019. Defendants filed an answer on 8 May 2019. The next day, Plaintiffs filed a motion for judgment on the pleadings. On 20 June 2019, Defendants filed two affidavits in opposition to the motion.[1] After conducting a hearing on 9 July 2019, the trial court entered an order on 11 July 2019, granting Plaintiffs' motion for judgment on the pleadings, and declaring that "Plaintiffs have a perpetual appurtenant easement across the land designated "30' INGRESS / EGRESS EASEM'T" on the plat maps referenced by both Plaintiffs' and Defendants' deeds." Defendants timely filed notice of appeal.

II. Factual Background

Prior to 1980, Walter and Coma Willard owned a tract of land located between Penny Road and Lake Wheeler Road in Wake County. In 1980, the Willards conveyed the northwestern, 3-acre portion of their property at 5005 Penny Road ("Penny Rd. Property") to David Hursey and his wife by a general warranty deed recorded in the Wake County Registry.[2] The Willards retained ownership of the remaining tract ("Willard Tract") that adjoined the Penny Rd. Property on the east and south sides and extended east to Lake Wheeler Road. A survey map of the Penny Rd. Property was recorded in 1981 ("Penny Rd. Property Map"), and is depicted below. The Penny Rd. Property Map shows both the Penny Rd.

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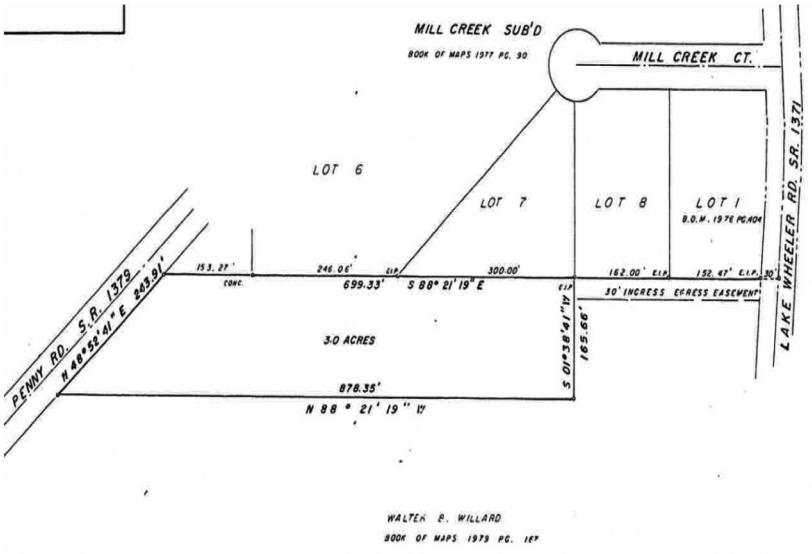
1. Defendants did not otherwise file a response in opposition to the motion.

2. All recordings referred to herein were filed in the Wake County Registry.

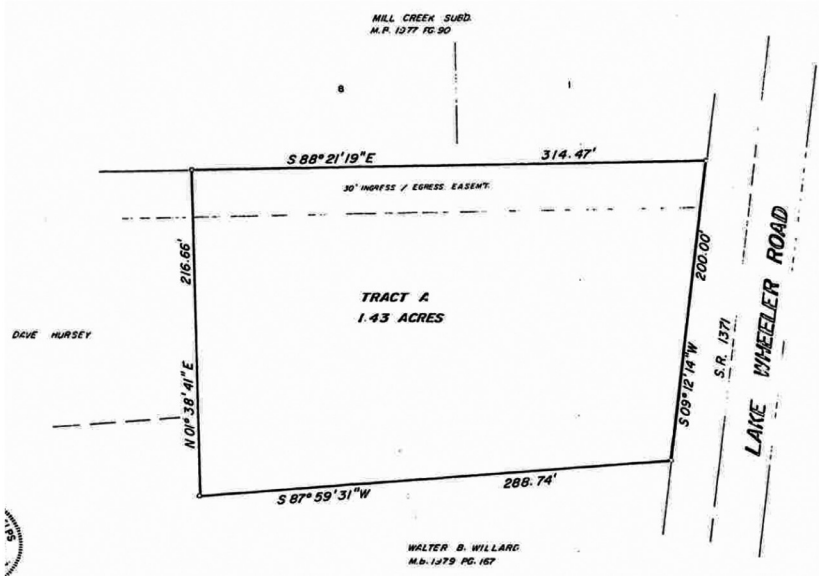
Property and the adjoining Willard Tract. The Willard Tract includes an area labeled "30' INGRESS EGRESS EASEMENT" running across the entire northern border of the Willard Tract, from the Penny Rd. Property on the west side to Lake Wheeler Road on the east side.

Penny Rd. Property Map



In 1983, the Willards subdivided the northeastern portion of the Willard Tract at 4900 Lake Wheeler Road and recorded a map of the newly created 1.43-acre parcel, labeling it "Tract A" ("Subdivision Map"). The Subdivision Map, depicted below, includes an area on the northern border of Tract A labeled "30' INGRESS / EGRESS EASEM'T," running across the entire 314.47-foot northern boundary of Tract A, from the Penny Rd. Property on the west side to Lake Wheeler Road on the east side. The dotted line representing the southern boundary of the area labeled "30' INGRESS / EGRESS EASEM'T" extends partly into the adjoining Penny Rd. Property. At the time the Subdivision Map was recorded, the Penny Rd. Property was owned by the Hurseys and is accordingly labeled "Dave Hursey."

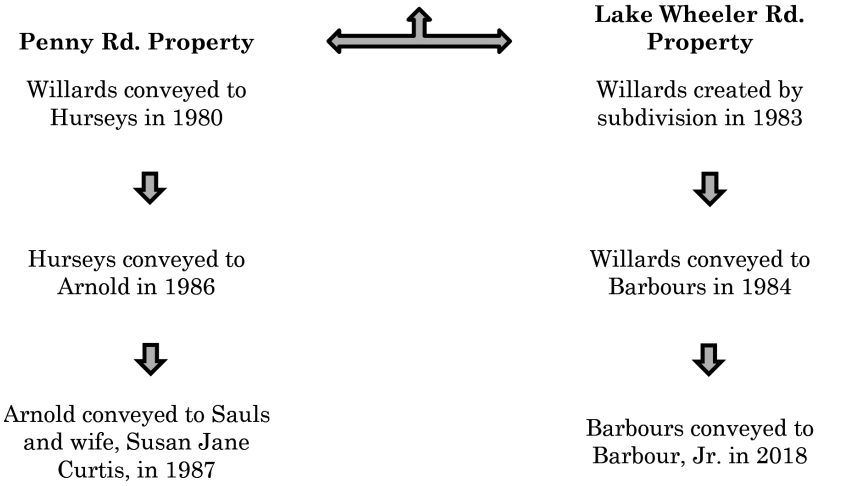
Subdivision Map



In 1984, the Willards conveyed Tract A at 4900 Lake Wheeler Road ("Lake Wheeler Rd. Property") to Robert Barbour and his wife, Barbara Barbour, by a recorded general warranty deed ("Barbour Deed"). The Barbour Deed expressly refers to the Subdivision Map recorded by the Willards in 1983, which shows the "30' INGRESS / EGRESS EASEM'T." The Barbour Deed also states that title to the property is subject to "all easements of record in the Wake County Registry which affect the title of the said lot."

The Barbers conveyed the Lake Wheeler Rd. Property in 2018 to their son, Robert Barbour, Jr., by a non-warranty deed ("Barbour Jr. Deed"). The Barbour Jr. Deed was recorded and expressly refers to the Subdivision Map recorded by the Willards in 1983, which shows the "30' INGRESS / EGRESS EASEM'T." Robert Barbour, Jr., is the record owner of the Lake Wheeler Road Property and resides there with his father, Robert Barbour (collectively "Defendants").

The Penny Rd. Property was conveyed by the Hurseys in 1986 to Richard Arnold by general warranty deed. Arnold conveyed it in 1987 to John Sauls and his wife, Susan Jane Curtis, by general warranty deed ("Sauls Deed"). The Sauls Deed expressly refers to the Penny Rd. Property Map recorded in 1981, which shows the "30' INGRESS EGRESS EASEMENT." Plaintiffs are members of the Sauls family, who are currently the record owners of the Penny Rd. Property.



Plaintiffs allege that their family members used the property designated on the maps as an ingress/egress easement across Defendants' property to access their home from Lake Wheeler Road. In April 2018, Defendants parked a vehicle on that property, thereby blocking Plaintiffs' access to the Penny Rd. Property from Lake Wheeler Road. Barbour, Jr., later told Sauls that Plaintiffs do not have a legal easement over Defendants' property and that they could not continue to use the easement across Defendants' property to access their own.

III. Discussion

Defendants argue that the trial court erred by granting Plaintiffs' motion for judgment on the pleadings, because: (1) Defendants' submission of two affidavits opposing the motion converted it into one for summary judgment; (2) the trial court erred by effectively granting summary judgment; and (3) even if not converted into summary judgment, judgment on the pleadings was improper because material issues of fact exist, and Plaintiffs are not entitled to a perpetual appurtenant easement as a matter of law.

A. Submission of Affidavits

[1] Defendants first argue that their submission of two affidavits in opposition to Plaintiffs' motion for judgment on the pleadings converted the motion into one for summary judgment.

Rule 12(c) of the North Carolina Rules of Civil Procedure provides:

> After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to *and not excluded* by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

N.C. Gen. Stat. § 1A-1, Rule 12(c) (2019) (emphasis added).

This provision sets forth a procedure analogous to the conversion of a motion to dismiss under Rule 12(b)(6) to a motion for summary judgment. *See* 5C Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1371 (3d ed. 2020) (citing Fed. R. Civ. P. 12(d) ("If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56.")). With respect to both motions to dismiss and motions for judgment on the pleadings, the trial court is vested with discretion to choose whether to consider materials outside the pleadings submitted in support of or in opposition to those motions. *See id.* at §§ 1366, 1371. *See also McBurney v. Cuccinelli*, 616 F.3d 393, 410 (4th Cir. 2010) ("[A] judge need not convert a motion to dismiss into a motion for summary judgment as long as he or she does not consider matters outside the pleadings. . . . [N]ot considering such matters is the functional equivalent of excluding them—there is no more formal step required." (internal quotation marks and citation omitted)).

Documents attached to and incorporated within a complaint become part of the complaint. *Weaver v. Saint Joseph of the Pines, Inc.*, 187 N.C. App. 198, 204, 652 S.E.2d 701, 707 (2007). "They may, therefore, be considered in connection with a Rule 12(b)(6) or 12(c) motion without converting it into a motion for summary judgment." *Id.* (citation omitted). "[I]n the event that the matters outside the pleadings considered by the trial court consist only of briefs and arguments of counsel, the trial court need not convert the motion into one for summary judgment." *Steele v. Bowden*, 238 N.C. App. 566, 573, 768 S.E.2d 47, 54 (2014) (internal quotation marks, ellipses, brackets, and citation omitted).

In determining whether a trial court considered matters outside the pleadings when entering judgment on the pleadings, reviewing courts have looked to cues in the trial court's order. *See Davis v. Durham*

Mental Health/Dev. Disabilities/Substance Abuse Area Auth., 165 N.C. App. 100, 105, 598 S.E.2d 237, 241 (2004) (motion for judgment on the pleadings not converted into motion for summary judgment, even though plaintiff presented at least three documents to the trial court, where the order stated, "[b]ased upon the pleadings and the arguments of counsel, the Court finds that Defendant is entitled to entry of a judgment in its favor based on the pleadings"); *Privette v. Univ. of N.C. at Chapel Hill*, 96 N.C. App. 124, 132, 385 S.E.2d 185, 189 (1989) (Rule 12 motion was not converted into Rule 56 motion where affidavits were introduced to support the motion, because "the trial court specifically stated in its order that for the purposes of the Rule 12 motion, it considered only the amended complaint, memoranda submitted on behalf of the parties[,] and arguments of counsel").

In this case, prior to the hearing on the motion for judgment on the pleadings, Defendants filed two affidavits in opposition to the motion.[3] In its order granting the motion, the trial court specifically stated:

> After reviewing Plaintiffs' motion, evaluating the pleadings and all attachments, and considering the arguments of counsel, this Court concludes that no genuine issues of material fact remain, that this case may be decided as a matter of law, and that it is therefore appropriate to enter judgment on the pleadings.

As in *Davis* and *Privette*, the trial court's order indicates that the trial court evaluated the pleadings and all attachments, and considered the arguments of counsel. Notably, it does not state that the trial court considered Defendants' affidavits, which would appropriately have been considered on a motion for summary judgment. Additionally, nothing in the record indicates that the trial court considered matters beyond the pleadings, arguments, and briefs. Accordingly, although the affidavits were *presented* to the trial court, they were *excluded* by the trial court from consideration in its ruling. The motion was therefore not converted into one for summary judgment.

B. Summary Judgment

By Defendants' next two arguments, Defendants contend that the trial court erred in effectively awarding Plaintiffs summary judgment.

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3. Plaintiffs state in their appellate brief that they asked the trial court at the motion hearing to exclude the affidavits. Because the record on appeal does not contain a transcript of the hearing, we cannot determine whether the trial court ruled on this request in open court.

These arguments are necessarily dependent upon Defendants' position that their submission of affidavits converted Plaintiffs' motion for judgment on the pleadings into one for summary judgment. However, as explained above, Plaintiffs' motion for judgment on the pleadings was not converted into one for summary judgment where the trial court excluded Defendants' affidavits, and the trial court granted judgment on the pleadings in favor of Plaintiff. Defendants' argument is thus overruled.

C. Judgment on the Pleadings

[2] Finally, Defendants argue that, even if the motion for judgment on the pleadings was not converted into one for summary judgment, the trial court erred by entering judgment on the pleadings. Defendants specifically allege that a material issue of fact exists as to whether the description of the purported appurtenant easement is sufficient to identify such an easement.

This Court reviews a trial court's order granting a motion for judgment on the pleadings de novo. *Toomer v. Branch Banking & Tr. Co.*, 171 N.C. App. 58, 66, 614 S.E.2d 328, 335 (2005). Under a de novo review, we "may freely substitute our judgment for that of the trial court." *Carteret County v. Kendall*, 231 N.C. App. 534, 536, 752 S.E.2d 764, 765 (2014) (internal quotation marks, brackets, and citation omitted).

"A motion for judgment on the pleadings is the proper procedure when all the material allegations of fact are admitted in the pleadings and only questions of law remain." *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974) (citations omitted). The movant must show that no material issue of facts exists and that the movant is entitled to judgment as a matter of law. *Id.*

> The trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party. All well pleaded factual allegations in the nonmoving party's pleadings are taken as true and all contravening assertions in the movant's pleadings are taken as false. All allegations in the nonmovant's pleadings, except conclusions of law, legally impossible facts, and matters not admissible in evidence at the trial, are deemed admitted by the movant for purposes of the motion.

Id. (citations omitted).

"An easement is a right to make some use of land owned by another." *Tanglewood Prop. Owners' Ass'n, Inc. v. Isenhour*, 254 N.C. App. 823, 830, 803 S.E.2d 453, 458 (2017) (ellipsis and citation omitted).

"An appurtenant easement is an easement created for the purpose of benefiting particular land . . . [and] attaches to, passes with[,] and is an incident of ownership of the particular land." *Id.* at 830, 803 S.E.2d at 459 (citation omitted).

"An easement can be created in several ways, including grant, estoppel, way of necessity, implication, dedication, prescription, reservation, and condemnation." *Id.* (citation omitted). "Although easements must generally be created in writing, courts will find the existence of an easement by implication under certain circumstances." *Knott v. Wash. Hous. Auth.*, 70 N.C. App. 95, 97, 318 S.E.2d 861, 862-63 (1984) (citation omitted). "Appurtenant easements implied by plat are recognized in North Carolina." *Tanglewood*, 254 N.C. App. at 830, 803 S.E.2d at 459 (citing *Hinson v. Smith*, 89 N.C. App. 127, 131, 365 S.E.2d 166, 168 (1988) (holding property owners possess "a private easement over and across all of the property designated as 'Beach' on the recorded plat")). An appurtenant easement may be created "by implied dedication, with either a formal or informal transfer," *Nelms v. Davis*, 179 N.C. App. 206, 209, 632 S.E.2d 823, 826 (2006) (citation omitted), and may be created "when the purchaser whose transaction relies on the plat is conveyed the land," *Price v. Walker*, 95 N.C. App. 712, 715, 383 S.E.2d 686, 688 (1989). *See also Hinson*, 89 N.C. App. at 130, 365 S.E.2d at 167 ("Conduct which implies the intent to dedicate may operate as an express dedication, as where a plat is made and land is sold in reference to the plat.").

"The easement areas must be sufficiently identified on the plat in order to establish an easement, although an express grant is not required." *Tanglewood*, 254 N.C. App. at 830, 803 S.E.2d at 459 (citing *Conrad v. West-End Hotel & Land Co.*, 126 N.C. 776, 779-80, 36 S.E. 282, 283 (1900) (holding purchasers' deed reference to plat containing area identified "Grace Court" sufficient to establish purchasers' right to "open space of land"); *Harry v. Crescent Res., Inc.*, 136 N.C. App. 71, 75, 80, 523 S.E.2d 118, 121, 123-24 (1999) (determining remnant parcels depicted on plat and "described by metes and bounds" but not further identified insufficient to establish an easement); *Hinson*, 89 N.C. App. at 130-31, 365 S.E.2d at 167-68 (finding area designated "Beach" on recorded plat referenced by property owners' deeds sufficient to establish a private easement)).

In this case, Plaintiffs attached the following documents of public record to their amended complaint, incorporating them by reference: the Sauls Deed, which explicitly refers to the Penny Rd. Property Map; the Penny Rd. Property Map; the Barbour Deed and the Barbour Jr. Deed, which both explicitly refer to the Subdivision Map; and the Subdivision

Map. These documents thus became part of the complaint and were properly considered in connection with Plaintiffs' motion for judgment on the pleadings. *See Weaver*, 187 N.C. App. at 204, 652 S.E.2d at 707. Defendants admitted the existence of these documents in their answer and admitted that "[b]oth plats referenced in Plaintiffs' and Defendants' deeds show the Easement as '30' INGRESS / EGRESS EASEM'T.' "

The Sauls Deed expressly refers to the Penny Rd. Property Map, which shows the 30-foot ingress/egress easement on and across Defendants' property. The Barbour Deed and Barbour Jr. Deed expressly refer to the Subdivision Map, which shows the 30-foot ingress/egress easement on and across Defendants' property. *See Price*, 95 N.C. App. at 715, 383 S.E.2d at 688 (An appurtenant easement may be created "when the purchaser whose transaction relies on the plat is conveyed the land"). The inclusion of the specifically labeled 30-foot ingress/egress easement on the recorded Subdivision Map demonstrates the Willards' intent that the ingress/egress easement be used by the owners of the Penny Rd. Property to traverse the Lake Wheeler Rd. Property to access their property from Lake Wheeler Road. *See Hinson*, 89 N.C. App. at 130, 365 S.E.2d at 167; *Nelms*, 179 N.C. App. at 209, 632 S.E.2d at 826 (appurtenant easement may be created by implied dedication, either by formal or informal transfer).

As in *Price* and *Hinson*, the easement in this case is sufficiently identifiable to establish an ingress/egress easement across Defendants' Lake Wheeler Rd. Property for the benefit of Plaintiffs' Penny Rd. Property. Both recorded maps show that the easement across Defendants' property: (a) is labeled as an ingress/egress easement; (b) is coterminous with the northern boundary of Defendants' property, which is described in metes and bounds in the Barbour Jr. Deed, on the Subdivision Map, and on the Penny Rd. Property Map, and is labeled 314.47 feet long; (c) intersects with Lake Wheeler Road on its east side; (d) intersects with the Penny Rd. Property on the west side; and (e) is 30 feet wide, as can be inferred from the "30' ingress/egress easement" label.

Defendants argue that the description of the easement on the map is ambiguous. Defendants assert that "notwithstanding the ingress/egress terms," "there is a question whether the description of the purported ingress/egress easement is, as a matter of law, sufficient to identify itself or whether it locates the utility easement." Defendants point to the affidavits submitted to, and excluded by, the trial court to support their argument that the area labeled on the maps "30' INGRESS / EGRESS EASEM'T" is not an ingress/egress easement but is actually a 30-foot utility easement. Defendants' argument is meritless.

First, the plain language of the label "INGRESS / EGRESS EASEM'T" defeats Defendants' argument that the easement shown on the parties' respective maps is not an ingress/egress easement but is instead a "utility easement." *See Swaim v. Simpson*, 120 N.C. App. 863, 864-65, 463 S.E.2d 785, 787 (1995) ("Because the deed identified the easement as one for ingress and egress, the trial court erred in expanding its use" "to provide for the location, installation, and maintenance of facilities for domestic utilities[.]"). "When the language [of a conveyance] . . . is clear and unambiguous, effect must be given to its terms . . . ." *Weyerhaeuser Co. v. Carolina Power & Light Co.*, 257 N.C. 717, 719, 127 S.E.2d 539, 541 (1962). The term "ingress/egress easement" is neither ambiguous nor silent as to the scope of the easement. As Defendants note, the terms "ingress/egress" must be ignored in order for Defendants' argument to be tenable.

Defendants also argue that the "30' ingress/egress easement" language is insufficient to identify an appurtenant easement because the southern boundary line of the easement is incapable of being located. Defendants assert that it is not possible to determine if the easement is 30 feet wide since the easement's label on the Subdivision Map does not contain the word "wide." However, according to the Subdivision Map, the length of the easement is 314.47 feet. Hence, the 30-foot descriptor refers to the width of the easement.

Defendants further argue that the southern boundary line of the easement is incapable of being located because it is represented by a dotted line, which indicates that this boundary was not surveyed. As explained above, the easement represented on the maps is 314.47 feet long and 30 feet wide. The northern boundary of the easement is coterminous with the northern boundary of the Lake Wheeler Rd. Property. The southern boundary of the easement is located 30 feet from and below the northern boundary of the property at all points along the easement.

The recorded deeds and plats create a sufficiently identifiable appurtenant ingress/egress easement across the Lake Wheeler Rd. Property, which provides access to the Penny Rd. Property from Lake Wheeler Road. *See Tanglewood*, 254 N.C. App. at 830, 803 S.E.2d at 459; *Hinson*, 89 N.C. App. at 130, 365 S.E.2d at 167. All material allegations of fact were admitted in the pleadings. Plaintiffs were entitled to an easement as a matter of law. The trial court did not err by entering judgment on the pleadings in favor of Plaintiff. *See Ragsdale*, 286 N.C. at 137, 209 S.E.2d at 499.

III. CONCLUSION

The motion for judgment on the pleadings was not converted into one for summary judgment. Judgment on the pleadings was proper because all material allegations of fact were admitted in the pleadings. As a matter of law, Plaintiffs' dominant estate is served by a perpetual appurtenant easement across the portion of Defendants' property designated "30' INGRESS / EGRESS EASEM'T" on the plat maps referenced by both Plaintiffs' and Defendants' deeds. We affirm the trial court's order.

AFFIRMED.

Chief Judge McGEE and Judge TYSON concur.

STATE OF NORTH CAROLINA
v.
OMARI LEWIS CRUMP, SR., DEFENDANT

No. COA19-747

Filed 1 September 2020

1. Criminal Law—motion for mistrial—inadmissible evidence—curative instruction—jury polled

In a prosecution for forcible sexual offense, the trial court did not abuse its discretion by denying defendant's motion for mistrial where, after the victim testified that someone had pressured her not to testify, the trial court sustained defendant's objection to the testimony, gave a strong curative instruction to the jury (even stating that the person who pressured the victim was not defendant), and polled the jurors as to their understanding of the curative instruction.

2. Constitutional Law—effective assistance of counsel—admission of element of charge—no violation

Where defense counsel admitted an element of the charge against defendant (that he engaged in a sexual act with the victim—an element of second-degree forcible sexual offense) during closing argument without defendant's consent, defendant's Sixth Amendment right to effective assistance of counsel was not violated. Neither admission of an element of a charge nor misspeaking constitute a per se violation of the Sixth Amendment, and counsel's performance was not objectively deficient.

3. Constitutional Law—effective assistance of counsel—admission of element of charge—no structural error

The Court of Appeals declined to interpret *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), to extend *State v. Harbison*'s prohibition against admitting a client's guilt without consent to a prohibition against admitting an element of the charge without consent. Because defense counsel admitted only an element of the charge without defendant's consent, there was no structural error.

Appeal by Defendant from judgments entered 31 January 2019 by Judge Jesse B. Caldwell, III in Mecklenburg County Superior Court. Heard in the Court of Appeals 1 April 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Joseph Finarelli, for the State.

Franklin E. Wells, Jr. for defendant-appellant.

MURPHY, Judge.

The trial court did not abuse its discretion when, in response to questions deemed inadmissible regarding witness intimidation, it denied Defendant's motion for a mistrial, sustained Defendant's objection to the questions, gave a curative instruction to the jury, and polled the jury as to their understanding of the curative instruction.

Further, the United States Supreme Court's recent decision in *McCoy v. Louisiana* does not change our ineffective assistance of counsel analysis. *McCoy v. Louisiana*, 138 S. Ct. 1500, 200 L. Ed. 2d 821 (2018). When a defense counsel makes statements in closing that are either an admission of an element of the charged crime or misstatements that defense counsel rectifies, a defendant's Sixth Amendment rights are not automatically violated.

BACKGROUND

Omari Lewis Crump ("Defendant") appeals his convictions of possession of a firearm by a felon and second-degree forcible sexual offense under N.C.G.S. § 14-27.27. The incident leading to his arrest involved an encounter with an individual initially thought to be his daughter, Kate.[1] At trial, the State presented evidence that Defendant discharged

1. This pseudonym is used throughout this opinion to protect the identity of the juvenile and for ease of reading.

a shotgun from his apartment's balcony and forcibly attempted to have sexual intercourse with Kate. Defendant asserts two issues on appeal.

First, Defendant argues the trial court abused its discretion when, after the State asked Kate if anyone had pressured her not to testify, it denied his motion for a mistrial and instead gave a curative instruction to the jury. Defendant argues the trial court's instruction was insufficient to cure the prejudice caused by these questions. Before trial, Defendant moved to exclude testimony *from a detective* pertaining to Kate's grandmother allegedly pressuring Kate not to testify. The State acknowledged the issue would be moot unless it called the detective as a witness and agreed to refrain from questions and comments regarding the detective's potential testimony on that matter.[2]

When the State asked Kate if anyone had pressured her not to testify, Defendant objected, and the trial court overruled the objection. When the State asked how the person pressured Kate not to testify, Kate stated someone had pressured her not to testify; Defendant objected again and asked to be heard, and the trial court excused the jury. Although the State claimed the questions pertained to Defendant's fiancée pressuring Kate, the trial court sustained Defendant's objection. The trial court sustained the objection due to hearsay, but also as unfairly prejudicial to Defendant under Rule 403 of the North Carolina Rules of Evidence in the event the testimony was not hearsay.

Defendant then moved for a mistrial, which the trial court denied; instead, the trial court decided to issue a "strong cautionary instruction." The subsequent cautionary instruction to the jury explained that the trial court was "striking [the testimony] from the record, and . . . from your consideration," and the court had "learned that whoever this person was, . . . was not this Defendant."

The trial court also polled the jury concerning their ability to disregard the prior line of questioning and accept the cautionary instruction; each juror affirmed their ability to disregard the State's questioning in the matter and to accept the cautionary instruction.

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2. On appeal, Defendant seeks to connect the State's partial agreement regarding the detective's testimony to the State's questions to Kate during trial. The connection between the subject matter of Defendant's applicable motion in limine and the State's questioning of Kate is tenuous, as the State's agreement during motions in limine was to refrain from certain questions to the detective, not to Kate. We focus our analysis on the State's questions to Kate during trial, Defendant's objections to those questions, and the trial court's response to those questions and objections. We do not agree with Defendant that the State violated its agreement concerning the applicable motion in limine.

Second, Defendant argues Defense Counsel's direct or tacit admission, without Defendant's consent, that Defendant and Kate had sexual contact violated his Sixth Amendment rights and was ineffective assistance of counsel or structural error.

Defendant references two types of statements Defense Counsel made in closing—the first regarding incest, and the second regarding consent. The State initially charged Defendant with incest, but later dropped the charge. In closing, Defense Counsel made statements regarding the State's unsuccessful case against Defendant relating to incest, stating "the [S]tate had a slam-dunk incest case" initially, but the State's expert "determined they weren't related." Defense Counsel stated he was not conceding any element of the crime, but made multiple statements regarding consent and sexual contact between Defendant and Kate. After these comments, the trial court ascertained Defense Counsel made these statements without Defendant's consent. The trial court allowed Defense Counsel to reopen his closing statement due to Defendant's concerns about the comments regarding sexual activity with Kate, and Defense Counsel's explanation to the trial court that the expressed view regarding the strength of the incest case "was the [former] view of the [S]tate," not Defense Counsel's view. Upon reopening closing argument, Defense Counsel stated "[w]hat was meant to be said was the [S]tate *thought* they had a slam-dunk incest case, and then they found it was determined it wasn't there." (Emphasis added). After Defense Counsel's comments in the re-opened closing argument, the trial court polled the jurors concerning the comments, ensuring the jury understood Defendant's position.

Defendant argues he is entitled to a new trial if we agree with either claim of error.

ANALYSIS

A. Mistrial

[1] We review a trial court's denial of a defendant's motion for mistrial for abuse of discretion. *State v. Hester*, 216 N.C. App. 286, 290, 715 S.E.2d 905, 908 (2011). "It is well settled that a motion for a mistrial and the determination of whether [a] defendant's case has been irreparably and substantially prejudiced is within the trial court's sound discretion." *State v. McNeill*, 349 N.C. 634, 646, 509 S.E.2d 415, 422-23 (1998) (quoting *State v. King*, 343 N.C. 29, 44, 468 S.E.2d 232, 242 (1996)). "The trial court's decision in this regard is to be afforded great deference since the trial court is in a far better position than an appellate court to determine whether the degree of influence on the jury was irreparable." *King*, 343

N.C. at 44, 468 S.E.2d at 242. Often, "[a]ny potential prejudice [is] cured by the trial court's instruction to the jury not to consider the remark." *McNeill*, 349 N.C. at 648, 509 S.E.2d at 423. In *State v. Locke*,

> the trial court's prompt actions of sustaining the objections and issuing a curative instruction were sufficient to cure any prejudice. This Court has held consistently that such actions cure any prejudice due to a jury's exposure to incompetent evidence from a witness. . . . [The] defendant's argument appears to be that the mere questions posed by the prosecutor were prejudicial. The Court applies the same rule when faced with this situation.

State v. Locke, 333 N.C. 118, 124, 423 S.E.2d 467, 470 (1992) (internal citation omitted).

The questions at issue are:

[State:]	Has anyone tried to talk you out of coming to court?
[Defense Counsel:]	Objection.
THE COURT:	Overruled.
[Kate:]	Yes.
[State:]	How specifically did that person try to talk you out of coming to court?
[Kate:]	One, they offered me money not to come.
[Defense Counsel:]	Objection. May we be heard, Your Honor?

After determining this testimony was inadmissible, the trial court denied Defendant's motion for a mistrial and gave the following subsequent cautionary instruction to the jury:

> *The Court will sustain the objection to the last question and indeed to all the questions on that last topic*. And the Court is going to -- Members of the Jury, I'm *striking from the record*, and therefore will tell you to *strike from your consideration*, any testimony that some person whose name you have not heard, talked to this witness about not coming to court.

> That is no longer in the record, and it's no longer for your consideration. I'm instructing you not to consider that in any way, shape or form in your deliberations.
>
> Moreover, *I'm going to go a step further*, that's usually what I would do. I'm going to go a step further. I'm telling you that *I have learned that whoever this person was*, if they said what was alleged to be said, *was not this Defendant*. So that whoever that person that you heard was unnamed, that was not [Defendant], it was not [Defendant]; all right?
>
> I will further tell you that *the State and [Defendant] agree that there is no evidence whatsoever that [Defendant] solicited* anybody to talk with this witness about upcoming court, or *coached or enticed or paid* somebody to talk to this witness about not coming to court, *or even knew* of any statement or effort on the part of another person, whoever that might be, to talk to this witness about not coming to court.
>
> Whoever that person was, I'm telling you it was not [Defendant], and that's from the State; okay? And I'm also telling you the D.A.s and [Defendant] agree that there is *no evidence to implicate [Defendant] in any way shape or form that somebody warned this witness saying don't come to court*, if that was said. Having said that, don't consider it, *compartmentalize it*.

(Emphasis added).

After the cautionary instruction, the trial court polled the jurors in the following manner:

> So let me ask a question. . . . How many Members of the Jury believe that you can accept what I've told you, that whoever that was, it was not [Defendant], that there's no evidence at all that he knew anything about it or had anything to do with it?
>
> And further, can even ignore and block this away and never consider it as you debate on the verdicts in these cases? If you can do that, please raise your hand.
>
> (Affirmative response from the fourteen jurors.)

> THE COURT: The Court finds that all twelve jurors and two alternative juror[s] have replied in the affirmative. If you could not do that, if you believe that somehow or another this is going to affect your deliberation or you can't put it out of your mind, please raise your hand.
>
> (No response from the fourteen jurors.)
>
> THE COURT: Let the record reflect that no jurors have replied in the affirmative.

In light of our caselaw regarding the import and effect of jury instructions to cure potential prejudice, as well as removal of evidence from the consideration of the jury, the denial of the motion for a mistrial in this case was not an abuse of discretion. *See McNeill*, 349 N.C. at 648, 509 S.E.2d at 423; *see also Locke*, 333 N.C. at 124, 423 S.E.2d at 470. We also note the connection between the subject matter of Defendant's applicable motion in limine and the State's questioning of *Kate* is tenuous, as the State's agreement during motions in limine was to refrain from asking certain questions *to the detective*.

The trial court properly exercised its discretion by issuing a strong curative instruction to the jury and by polling the jury on disregarding the inadmissible testimony to cure any potential prejudice. *See McNeill*, 349 N.C. at 648, 509 S.E.2d at 423; *see also Locke*, 333 N.C. at 124, 423 S.E.2d at 470.

B. Defense Counsel's Closing Arguments

1. Standard of Review

"The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009).

> When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness. In order to meet this burden[, a] defendant must satisfy a two part test. 'First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's error[was] so serious as

> to deprive the defendant of a fair trial, *a trial whose result is reliable*.'

State v. Braswell, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984)) (internal citations omitted).

"[I]neffective assistance of counsel, per se in violation of the Sixth Amendment, has been established in every criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent." *State v. Harbison*, 315 N.C. 175, 180, 337 S.E.2d 504, 507-508 (1985). However, where "counsel [admits an element of the crime charged, but does] not admit guilt [and tells] the jury that they could find the defendant not guilty . . . [the admission] does not fall with the *Harbison* line of cases where violation of the defendant's Sixth Amendment rights are presumed." *State v. Fisher*, 318 N.C. 512, 533, 350 S.E.2d 334, 346 (1986); *see generally State v. Gainey*, 355 N.C. 73, 93, 558 S.E.2d 463, 476 (2002).

If defense counsel admits the guilt of his or her client during trial over the disagreement of the defendant, defense counsel violates his or her client's Sixth Amendment rights and commits structural error. *McCoy*, 138 S. Ct. at 1509-11, 200 L. Ed. 2d at 831-33.

2. Ineffective Assistance of Counsel

[2] Although usually properly resolved at the trial court, we address Defendant's ineffective assistance of counsel argument, which centers on Defense Counsel's statements during closing argument regarding sexual contact between Defendant and Kate. *See State v. Clark*, 159 N.C. App. 520, 531, 583 S.E.2d 680, 687 (2003) ("Ineffective assistance of counsel claims are usually raised in post-conviction proceedings and not on direct appeal. Such claims may, however, be raised on direct appeal when the cold record reveals that no further factual development is necessary to resolve the issue."). In closing, Defense Counsel made the following statements regarding the State's unsuccessful case against Defendant:

> The [S]tate went from a theory of incest, because everybody presumed they were related, until [the State's expert] took out her computer and looked at the alleles and determined they weren't related.
>
> . . .
>
> "[T]he [S]tate had a slam-dunk incest case. No longer. After [the State's expert] did her scientific testing on both

> buccal swabs from [Kate] and from [Defendant], the family relationship was over."

Despite Defense Counsel's statement he was not conceding any element of the crime, he also made statements regarding consent and sexual contact:

> I'm going to suggest to you the real operative fact in this case, as dirty and unpalatable as the facts are, is whether there was consent and whether it was by force.
>
> . . .
>
> [Kate] signed off on it happening . . . . You can attach her inference to it, but I'll tell you the inference it attaches to. It attaches to this situation was consensual at that point.
>
> . . .
>
> [T]he [S]tate had a slam-dunk incest case. No longer. After [the State's expert established Defendant and Kate were not related], the family relationship was over, [and] we're left with a second-degree sex offense where consent and force and these other things have to come into play.

If Defense Counsel admitted Defendant's guilt in closing argument without the consent of Defendant, counsel violated Defendant's Sixth Amendment rights, and Defendant would prevail on his ineffective assistance of counsel claim. *See Harbison*, 315 N.C. at 180, 337 S.E.2d at 507-508. However, the transcript does not reveal any such admission of guilt occurred, and caselaw does not support Defendant's argument that an admission of an element of the charge violates his Sixth Amendment rights. *See Fisher*, 318 N.C. at 533, 350 S.E.2d at 346; *Gainey*, 355 N.C. at 93, 558 S.E.2d at 476.

Defense Counsel either admitted an element of a charge without Defendant's consent or misspoke. First, Defense Counsel may have *admitted an element*—specifically, the "engages in a sexual act with another person" element—of the second-degree forcible sexual offense charge without Defendant's consent, particularly in his discussion of consent as it related to Defendant and Kate. If the statements during closing argument were not such an admission, Defense Counsel *misspoke* concerning the incest charge the State dismissed and its supposed effect on the State's strategy at trial. Neither an admission of an element without Defendant's consent nor misspeaking constitute a per se violation of *Harbison* or *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984).

Defense Counsel's statements regarding consent and the dismissed incest charge relate to second-degree forcible sexual offense defined by statute as:

> (a) A person is guilty of second degree forcible sexual offense if the person engages in a sexual act with another person:
>
> (1) By force and against the will of the other person[.]

N.C.G.S. § 14-27.27 (2019). If Defense Counsel's comments regarding consent and the dropped incest charge were an admission of consensual sexual contact between Defendant and Kate, Defense Counsel would have admitted commission of section (a) of the statute—"if the person engages in a sexual act with another person." N.C.G.S. § 14-27.27 (a) (2019). However, an admission of consensual sexual contact is not an admission of the "[b]y force and against the will of the other person" element. N.C.G.S. § 14-27.27 (a)(1) (2019). Nowhere in his closing argument did Defense Counsel admit his client's guilt under every element of N.C.G.S. § 14-27.27; specifically, Defense Counsel did not admit to *both* (a) and (a)(1). *See id.* Defense Counsel vociferously argued that Defendant did not perpetrate sexual contact "[b]y force and against the will of the other person." *Id.* Thus, Defense Counsel did not admit Defendant's guilt under the statute and did not commit a per se Sixth Amendment violation under *Harbison*.

However, Defense Counsel's statements could also have been a simple misstatement, which was properly remedied by re-opening his closing argument to clarify what he meant, as an incest charge was not before the trial court. Defense Counsel claimed he meant to argue the State had to change its approach when DNA evidence showed Defendant was not Kate's biological father; in other words, Defense Counsel argued the State thought it had an easy conviction regarding incest, but the DNA evidence changed the case to one of force and consent.

We disagree with Defendant's argument on appeal that Defense Counsel's comments concerning a dropped incest charge and whether sexual contact between Defendant and Kate was consensual were a violation of *Strickland* and constituted ineffective assistance of counsel. We review Defense Counsel's comments according to the highly deferential judicial scrutiny of counsel's performance required by *Strickland*. *Strickland*, 466 U.S. at 680-81, 80 L. Ed. 2d at 689. An admission of an element does not constitute an admission of guilt, and the comments were not a *Harbison* violation. *See Fisher*, 318 N.C. at 533, 350 S.E.2d at 346; *Gainey*, 355 N.C. at 93, 558 S.E.2d at 476.

Furthermore, tactical errors and misstatements do not necessarily equate to a Sixth Amendment violation. *Fisher*, 318 N.C. at 533-34, 350 S.E.2d at 346-47. Since incest was not a charge before the trial court, and the jury had heard expert testimony that Defendant was not the biological father of Kate, Defense Counsel's statements regarding the State having "a slam-dunk incest case" were not objectively deficient representation resulting in prejudice that made a fair trial impossible. Rather, Defense Counsel's comments attacked the State's strategy and strength of position in its prosecution of Defendant, which was not objectively deficient representation under *Strickland*.

3. Structural Error

[3] Defendant also argues Defense Counsel committed structural error, asking us to interpret *McCoy v. Louisiana* to extend *Harbison*'s prohibition from admitting a client's *guilt* to a prohibition of admitting an *element* without a client's consent. *See McCoy*, 138 S. Ct. at 1509-11, 200 L. Ed. 2d at 831-34. In *McCoy*, the United States Supreme Court held that

> [b]ecause a client's autonomy, not counsel's competence, is in issue, we do not apply our ineffective-assistance-of-counsel jurisprudence . . . to McCoy's claim. To gain redress for attorney error, a defendant ordinarily must show prejudice. Here, however, the violation of McCoy's protected autonomy right was complete when the court allowed counsel to usurp control of an issue within McCoy's sole prerogative [when counsel admitted McCoy murdered three family members over McCoy's objection].
>
> Violation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called "structural"; when present, such an error is not subject to harmless-error review.

Id. at 1510-11, 200 L. Ed. 2d at 833 (internal citations omitted).

However, the approach Defendant proposes does not comport with the Supreme Court's holding and view of the facts in *McCoy*. *Id.* at 1512, 200 L. Ed. 2d 821. In *McCoy*, the defendant pleaded not guilty to murdering three family members. *Id.* at 1505-06, 200 L. Ed. 2d at 827. Over the defendant's repeated disagreement, the defense counsel admitted his client "committed three murders. . . . [The defense counsel admitted] he's guilty . . . [and] told the jury . . . that McCoy was the killer" and " 'took [the] burden off of [the prosecutor] . . . on that issue.' " *Id.* at

1505-07, 200 L. Ed. 2d at 827-29. The defense counsel also stated "there was 'no way reasonably possible' that [the jury] could hear the prosecution's evidence and reach 'any other conclusion than Robert McCoy was the cause of these individuals' death,' " and " '[his] client committed three murders.' " *Id.* at 1506-07, 200 L. Ed. 2d at 828.

The Supreme Court deemed the defense counsel's "admission of McCoy's *guilt* despite McCoy's insistent objections [to be] incompatible with the Sixth Amendment," which constituted structural error, as the admissions prevented the defendant from making "the fundamental choices about his own defense," namely whether to plead guilty or not guilty. *Id.* at 1511-12, 200 L. Ed. 2d at 834 (emphasis added). Even Justice Alito's Dissent, which posited that the defense counsel only admitted an element that would necessitate a different result, acknowledged "[w]hen the Court expressly states its holding, it refers to a concession of guilt," not the concession of an element. *Id.* at 1512 n.1, 200 L. Ed. 2d at 834 n.1. According to Justice Alito, McCoy's counsel only admitted the commission of an element, which would not constitute error. *Id.* at 1512, 200 L. Ed. 2d at 834-35.

In light of the Majority and the Dissent in *McCoy* differing on whether the defense counsel admitted guilt or an element of the offense but not on the result each type of admission merited, *McCoy* did not change our *Harbison* landscape. Defendant's argument that the admission of an element without a client's consent constitutes structural error because "Mr. McCoy's lawyer made it clear he was only admitting one element" does not comport with the holding in *McCoy*, where the Majority repeatedly stated McCoy's lawyer admitted his client's *guilt*, not an element. *Id.* at 1510-12, 200 L. Ed. 2d at 833-34.

Here, Defense Counsel's comments during closing arguments were at most an admission of an element of the offense without Defendant's consent. There was no structural error.

CONCLUSION

The trial court did not abuse its discretion when it denied Defendant's motion for a mistrial, and instead gave a curative instruction to the jury and polled the jurors on their understanding.

Defense Counsel's performance was not objectively deficient under *Strickland*. *McCoy* does not change our ineffective assistance of counsel analysis. Defense Counsel's statements, which were either an admission of an element of second-degree forcible sexual offense or misstatements Defense Counsel rectified, did not violate Defendant's Sixth

Amendment rights, no structural error occurred, and Defense Counsel provided effective assistance of counsel under *Strickland*.

AFFIRMED.

Judges COLLINS and YOUNG concur.

STATE OF NORTH CAROLINA
v.
JARRION E. HOOD

No. COA19-736

Filed 1 September 2020

1. Jury—selection—motion to strike jury panel—lack of randomness—prejudice analysis

In a murder trial, defendant failed to show he was prejudiced by the trial court's denial of his motion to strike the first twelve prospective jurors for lack of randomness (eleven of whom had surnames that started with the letter "B"). Even if the selection of names was not random as required by statute (N.C.G.S. § 15A-1214(a)), defendant neither struck nor exercised a peremptory challenge against any of these prospective jurors, six of whom were ultimately empaneled on the jury, and made no showing that the selection process affected the outcome of his trial.

2. Jury—selection—Batson claim—summary denial—lack of findings

In a murder trial, the trial court erred by summarily denying defendant's *Batson* claim, asserting that the State dismissed a juror on the basis of race and that the State's purported race-neutral reason was pretextual, without making findings showing that it considered all of the evidence presented by defendant. The matter was remanded for a *Batson* hearing and entry of an order with requisite findings and conclusions.

Appeal by defendant from judgments entered 29 May 2018 by Judge R. Allen Baddour, Jr., in Durham County Superior Court. Heard in the Court of Appeals 1 April 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sandra Wallace-Smith, for the State.

Marilyn G. Ozer for defendant-appellant.

ZACHARY, Judge.

Defendant Jarrion E. Hood appeals from judgments entered upon a jury's verdicts convicting him of first-degree felony murder, two counts of attempted robbery with a dangerous weapon, and possession of a firearm by a felon. On appeal, Defendant argues that the trial court (1) erred by denying his written motion to strike the initial jury panel, and (2) clearly erred by overruling his *Batson* challenge. After careful review, we conclude that Defendant's first argument lacks merit. With regard to Defendant's *Batson* challenge, we remand for the trial court to conduct a proper *Batson* hearing consistent with our Supreme Court's recent holding in *State v. Hobbs*, 374 N.C. 345, 841 S.E.2d 492 (2020).

Background

In October 2014, Adam Behnawa responded to Defendant's post on Craigslist.com listing a cell phone for sale. The men arranged to meet in a residential neighborhood in Durham County, North Carolina so that Behnawa could examine the cell phone and possibly purchase it from Defendant. In the early evening of 28 October 2014, Behnawa and his son, Jawad Razai, drove to the agreed-upon location. Upon approaching the driver's side window on foot, Defendant pointed a gun at Behnawa and Razai, demanded money, and proceeded to pistol-whip Behnawa. Behnawa gave Defendant $100 and attempted to drive away, but Defendant prevented him from leaving by reaching in and turning off the truck, and he demanded Behnawa's cell phone and more money.

Despite Razai's offer of money, Defendant continued pistol-whipping Behnawa about the head. Razai exited the truck, and was eventually able to grab Defendant from behind. The men struggled for Defendant's gun; two shots were fired, one of which mortally wounded Razai.

After a foot chase, Behnawa tackled Defendant. A bystander restrained Defendant while Behnawa returned to check on his son. Behnawa prayed in Farsi as he waited for the EMTs to arrive. Razai died at the hospital while Behnawa was at the police station giving his statement. Meanwhile, Defendant was arrested and charged with possession of a firearm by a felon, two counts of attempted robbery with a dangerous weapon, and murder.

The case against Defendant came on for trial on 14 May 2018 in Durham County Superior Court, the Honorable R. Allen Baddour, Jr., presiding.[1] Before commencing jury voir dire, defense counsel told the trial court that she was concerned that the jury venire had not been randomly selected. Counsel orally moved to strike the first 12 prospective jurors called from the jury panel; the trial court denied Defendant's motion and proceeded with voir dire. On the second day of voir dire, Defendant filed a written motion to strike the jury panel for lack of randomness, which the trial court denied in open court. On the third day of jury voir dire, Defendant raised a *Batson* challenge to the State's exercise of a peremptory strike against an African-American prospective juror. The trial court summarily denied Defendant's *Batson* challenge. The jury was empaneled the following day.

On 29 May 2018, the jury returned verdicts finding Defendant guilty of all charges. The trial court arrested judgment on both convictions for attempted robbery with a dangerous weapon. For his first-degree felony murder conviction, the trial court sentenced Defendant to life imprisonment without the possibility of parole. The trial court imposed an additional concurrent sentence of 15-27 months for Defendant's conviction for possession of a firearm by a felon. Defendant gave oral notice of appeal in open court.

Discussion

On appeal, Defendant argues that (1) the trial court erred by denying his written motion to strike the jury panel because it was not randomly selected, and (2) the trial court clearly erred by overruling his *Batson* challenge. We address each argument in turn.

I. Jury Selection Procedures

[1] There is a statutory two-step process for selecting the jury panel. First, the jury commission for each county constructs a master jury list of prospective jurors from lists of registered voters and licensed drivers, as well as other reliable sources of names. N.C. Gen. Stat. §§ 9-1 & 9-2(a)-(b) (2019). The clerk of superior court is then tasked with preparing a randomized list of names of individuals to be summoned for jury duty from the master jury list. *Id.* § 9-5. The clerk is required to prepare the randomized list by "a method of selection that results in each name on a list having an equal opportunity to be selected." *Id.* § 9-2(h).

1. A trial for these offenses initially commenced on 15 August 2017, but due to defense counsel's health problems, the trial court ordered a mistrial on 23 August 2017.

In criminal cases, "[j]urors are selected [from the jury panel] . . . pursuant to section 15A-1214(a), which provides in pertinent part: 'The clerk, under the supervision of the presiding judge, must call jurors from the panel by a system of random selection which precludes advance knowledge of the identity of the next juror to be called.' " *State v. Williams*, 363 N.C. 689, 709-10, 686 S.E.2d 493, 506 (2009) (quoting N.C. Gen. Stat. § 15A-1214(a) (2007)), *cert. denied*, 562 U.S. 864, 178 L. Ed. 2d 90 (2010). "The intended result of jury selection is to empanel an impartial and unbiased jury." *State v. Garcia*, 358 N.C. 382, 407, 597 S.E.2d 724, 743 (2004), *cert. denied*, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005).

In the instant case, Defendant contends that the trial court "violated the statutory mandate of random jury selection when it denied Defendant's written motion to strike" the first 12 prospective jurors called from the jury panel "for lack of randomness." Whether a trial court violated a statutory mandate is a question of law, subject to de novo review on appeal. *State v. Johnson*, 253 N.C. App. 337, 345, 801 S.E.2d 123, 128 (2017).

Prior to the commencement of jury selection, the clerk provided the prosecutors and defense counsel with the list of the first 12 jurors to be called from the master jury list. Each juror had previously been assigned a unique number: the numbers assigned to the first 12 prospective jurors were 25, 96, 61, 153, 6, 3, 133, 102, 165, 114, 122, and 121. Of these, 11 had surnames beginning with the letter "B," while the twelfth had a surname beginning with the letter "C." Ten of the initial prospective jurors self-identified as white or Caucasian, one as black or African-American, and one as mixed race.

Before beginning jury voir dire, defense counsel moved to strike from the jury panel the first 12 prospective jurors listed by the clerk, arguing that the fact that 11 of the first 12 prospective jurors had surnames that started with the letter "B" indicated that they had not been selected randomly. The clerk responded that this was "just coincidental." The trial court denied Defendant's motion in open court, reasoning that although "the possibility exists of an alphabetical list or a stack of juror cards being presented to the clerk, [i]t is just as likely that the list was presented to the clerk in random order or in numerical order," and concluding that the juror numbers were nonsequential and appeared to be random. Six of the first 12 prospective jurors were ultimately empaneled as jurors.

Assuming, *arguendo*, that the clerk violated the mandatory statutory procedure for calling jurors from the panel in the case at bar, "a new

trial does not necessarily follow a violation of [a] statutory mandate." *State v. Love*, 177 N.C. App. 614, 623, 630 S.E.2d 234, 240-41, *disc. review denied*, 360 N.C. 580, 636 S.E.2d 192 (2006). A defendant challenging such a violation must also establish "that [he was] prejudiced by this violation." *Id.* at 623, 630 S.E.2d at 241.

Defendant contends that he was prejudiced by the racial composition of the jury that resulted from the improper selection of the initial 12 prospective jurors from the jury panel. According to Defendant, the first 12 prospective jurors did not reflect the racial composition of Durham County: ten of the initial prospective jurors self-identified as white or Caucasian, one as black or African-American, and one as mixed race. The racial composition of the entire jury panel from which the initial 12 prospective jurors were drawn is not indicated.

In cases involving the violation of a statutory mandate for jury selection, "this Court has looked . . . to whether all peremptory challenges were exercised by the defendant in determining prejudice. If peremptory challenges are unused and the defendant makes no challenge for cause, then he cannot say he was forced to accept an undesirable juror." *Id.* at 623-24, 630 S.E.2d at 241 (citations omitted). Here, Defendant did not strike any of the initial 12 prospective jurors for cause, nor did he exercise a peremptory challenge against any of the initial 12 prospective jurors.

To be sure, it seems implausible that this particular selection of names for the initial 12 jurors called to the jury box would appear at random. Nevertheless, Defendant fails to raise "anything more than . . . a blanket assertion that [the] statutory violation of mandated jury selection procedures prejudiced [him]." *Id.* at 624, 630 S.E.2d at 241. We do not determine whether the first 12 prospective members called from the jury panel, or the jury panel as a whole, was randomly selected; however, even if there were a violation of section 15A-1214(a), Defendant has not established that the clerk's selection of the initial 12 prospective jurors "affected the conduct or outcome of his trial." *Garcia*, 358 N.C. at 408, 597 S.E.2d at 743. Accordingly, Defendant's first argument must fail.

II. Batson Challenge

[2] Defendant next contends that the State exercised a peremptory challenge against an African-American prospective juror for a racially discriminatory purpose, violating "the juror's constitutional right to serve on a jury and Defendant's constitutional rights to equal protection, due process and a jury of his peers."

A. Standard of Review

Upon review of a *Batson* inquiry, "[t]he findings of a trial court are not to be overturned unless the appellate court is convinced that its determination was clearly erroneous." *State v. Kandies*, 342 N.C. 419, 434-35, 467 S.E.2d 67, 75 (citation and internal quotation marks omitted), *cert. denied*, 519 U.S. 894, 136 L. Ed. 2d 167 (1996). Under this standard, an appellate court will not reverse the trial court's ruling "unless on the entire evidence we are left with the definite and firm conviction that a mistake has been committed." *State v. Taylor*, 362 N.C. 514, 528, 669 S.E.2d 239, 254 (2008) (citations and internal quotation marks omitted), *cert. denied*, 558 U.S. 851, 175 L. Ed. 2d 84 (2009). "[I]ssues of law are reviewed de novo." *Hobbs*, 374 N.C. at 349, 841 S.E.2d at 497.

B. Analysis

In North Carolina, a party may challenge an unlimited number of prospective jurors for cause. *See* N.C. Gen. Stat. § 15A-1212. Parties also may exercise a limited number of peremptory challenges to strike potential jurors, usually without any explanation. *See State v. Smith*, 291 N.C. 505, 526, 231 S.E.2d 663, 676 (1977) ("The essential nature of the peremptory challenge denotes that it is a challenge exercised without a reason stated, without inquiry and without being subject to the court's control."). Each defendant may exercise as many as six peremptory challenges during jury voir dire in a noncapital case, while the State is allowed six peremptory challenges per defendant. N.C. Gen. Stat. § 15A-1217(b). The parties are also "entitled to one peremptory challenge for each alternate juror in addition to any unused challenges." *Id.* § 15A-1217(c).

Peremptory challenges generally allow a party to remove a prospective juror for any reason. However, article I, section 26 of the North Carolina Constitution prohibits the use of peremptory challenges to exclude potential jurors "from jury service on account of sex, race, color, religion, or national origin." N.C. Const. art. I, § 26. In addition, the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States "prohibits discrimination in jury selection on the basis of race, *see Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986), or gender, *see J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 128 L. Ed. 2d 89 (1994)." *State v. Maness*, 363 N.C. 261, 271, 677 S.E.2d 796, 803 (2009), *cert. denied*, 559 U.S. 1052, 176 L. Ed. 2d 568 (2010). "Even a single act of invidious discrimination may form the basis for an equal protection violation." *State v. Robbins*, 319 N.C. 465, 491, 356 S.E.2d 279, 295, *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987).

In order to determine whether the State has engaged in impermissible racial discrimination in the selection of jurors, as proscribed by the United States Supreme Court in *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986), the trial court must conduct a three-part analysis:

> First, the defendant must establish a *prima facie* case that the State has exercised a peremptory challenge on the basis of race. Second, once the *prima facie* case has been established by the defendant, the burden shifts to the State to rebut the inference of discrimination by offering a race-neutral explanation for attempting to strike the juror in question. The explanation must be clear and reasonably specific, but need not rise to the level justifying exercise of a challenge for cause. The prosecutor is not required to provide a race-neutral reason that is persuasive or even plausible. The issue at this stage is the facial validity of the prosecutor's explanation; and unless a discriminatory intent is inherent in the explanation, the reason offered will be deemed race-neutral. Our courts also permit the defendant to introduce evidence at this point that the State's explanations are merely a pretext. Third, and finally, the trial court must make the ultimate determination as to whether the defendant has carried his burden of proving purposeful discrimination.

State v. Braxton, 352 N.C. 158, 179-80, 531 S.E.2d 428, 440-41 (2000) (citations and internal quotation marks omitted), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001).

Our Supreme Court recently addressed the assessment required of a trial court in evaluating a *Batson* challenge. *Hobbs*, 374 N.C. at 349-60, 841 S.E.2d at 497-503. The defendant in *Hobbs* was an African-American male who was indicted for numerous felonies, including murder. *Id.* at 346, 841 S.E.2d at 495. Prior to trial, the defendant filed a motion containing statistical information regarding prior capital cases tried in the county in which he was being tried.[2] *Id.* During voir dire, the defendant raised *Batson* challenges to the State's peremptory challenges of African-American prospective jurors. *Id.* The trial court denied the defendant's *Batson* challenges, ruling that the State's peremptory challenges were not made on the basis of race. The defendant was convicted

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2. Unlike the instant case, the defendant in *Hobbs* was capitally tried. *Hobbs*, 374 N.C. at 348, 841 S.E.2d at 496. However, this distinction has no bearing on our *Batson* analysis.

of first-degree murder by malice, premeditation, and deliberation, and also under the felony-murder rule, along with five other felonies. *Id.* at 346-47, 841 S.E.2d at 495.

On appeal, our Supreme Court held, in pertinent part, that the trial court erred by failing to properly "consider[ ] all of the evidence necessary to determine whether [the defendant] proved purposeful discrimination with respect to the State's peremptory challenges" of the potential jurors in question. *Id.* at 356, 841 S.E.2d at 501. Citing the United States Supreme Court's recent decision in *Flowers v. Mississippi*, ___ U.S. ___, ___, 204 L. Ed. 2d 638, 657 (2019), the *Hobbs* Court stated that a defendant attempting to prove purposeful discrimination is entitled to "rely on all relevant circumstances to support a claim of racial discrimination in jury selection[,]" and to offer evidence that might include:

- statistical evidence about the prosecutor's use of peremptory strikes against black prospective jurors as compared to white prospective jurors in the case;
- evidence of a prosecutor's disparate questioning and investigation of black and white prospective jurors in the case;
- side-by-side comparisons of black prospective jurors who were struck and white prospective jurors who were not struck in the case;
- a prosecutor's misrepresentations of the record when defending the strikes during the *Batson* hearing;
- relevant history of the State's peremptory strikes in past cases; or
- other relevant circumstances that bear upon the issue of racial discrimination.

Id.

"[W]hen a defendant presents evidence raising an inference of discrimination, a trial court, and a reviewing appellate court, must consider that evidence in determining whether the defendant has proved purposeful discrimination in the State's use of a peremptory challenge." *Id.* Thus, in *Hobbs*, the trial court erred by, *inter alia*, failing to "explain how it weighed the totality of the circumstances surrounding the prosecution's use of peremptory challenges, including the historical evidence," and failing to conduct a comparative juror analysis, in an order supported by findings of fact and conclusions of law, and the case was remanded for a new *Batson* hearing. *Id.* at 358, 841 S.E.2d at 502.

In the instant case, Defendant raised a *Batson* challenge to the State's use of a peremptory challenge to strike an African-American prospective juror, Jermichael Smith. Defense counsel first presented the trial court with evidence of the prosecutor's "strike rate," which she contended showed that the State had exercised a disproportionate number of challenges against African-American prospective jurors, together with historical evidence of racial disparities in jury selection in North Carolina and in Durham County specifically. Defense counsel also noted that Defendant was African-American, while the victims were Afghan-Americans, and were "described as light-skinned by the witnesses[.]"

Additionally, defense counsel argued that despite Smith being "an ideal juror for the State in many ways," there were other indicia of racial discrimination, including the prosecutor's disparate questioning of Smith as compared to the other prospective jurors. For example, defense counsel noted that the prosecutor asked Smith "about being from a middle-class neighborhood, which did not come up with any of the other jurors." Defense counsel also claimed, *inter alia*, that the State improperly exercised a peremptory challenge against Smith because "he said that his cultural beliefs were that he's a black male," which Smith "expressed as distrust of the system"; therefore, "to the extent that the cultural beliefs [we]re the reason for the strike, [Smith] himself . . . directly linked that to his race as a black male."

The prosecutor responded that Smith was peremptorily challenged for race-neutral reasons, offering in rebuttal that Smith expressed an intense distrust of the legal system, and that he seemed to be strongly affected by the murders of several friends, whose deaths he felt were "of little concern to the government." In addition, the prosecutor noted his personal impression from Smith's responses during voir dire that although Smith had previously been a crime victim, he had also been a participant in a crime.

Defense counsel asserted in surrebuttal that the State's "laundry list" of reasons for the peremptory challenge was "inherently some evidence of pretextualness." Counsel also argued that Smith's distrust of the system was the result of being a black male, and therefore was not a race-neutral reason for the State's exercise of its strike. Moreover, defense counsel asserted that Smith "was differentially questioned" as compared to other prospective jurors, who received far fewer questions from the prosecutor.

The State then responded to Defendant's surrebuttal. Defendant moved to strike the rebuttal to the surrebuttal, but the trial court did not

rule on that motion. The trial court then summarily denied Defendant's *Batson* challenge, without making any findings of fact or conclusions of law.

The trial court's summary denial of Defendant's *Batson* challenge precludes appellate review. The trial court was tasked with considering the evidence and determining whether the challenged strike of prospective juror Smith "was motivated in substantial part by discriminatory intent" on the part of the State. *Id.* at 353, 841 S.E.2d at 499 (citation and internal quotation marks omitted). Without specific findings of fact, this Court cannot establish on review that the trial court "appropriately considered all of the evidence necessary to determine whether [Defendant] proved purposeful discrimination with respect to the State's peremptory challenge[ ]" of Smith. *Id.* at 356, 841 S.E.2d at 501.

Moreover, the trial court's ruling was deficient in that it "did not explain how it weighed the totality of the circumstances surrounding the prosecution's use of peremptory challenges[.]" *Id.* at 358, 841 S.E.2d at 502; *see also id.* ("[T]here is nothing new about requiring a court to consider all of the evidence before it when determining whether to sustain or overrule a *Batson* challenge.").

Pursuant to *Hobbs*, the trial court therefore erred in failing to make the requisite findings of fact and conclusions of law addressing the evidence presented by counsel. *See id.* at 360, 841 S.E.2d at 503-04 (remanding to the trial court with instructions "to conduct a *Batson* hearing . . . [and] to make findings of fact and conclusions of law"); *State v. Williams*, 343 N.C. 345, 359, 471 S.E.2d 379, 386 (1996) ("[I]t becomes the responsibility of the trial court to make appropriate findings on whether the stated reasons are a credible, nondiscriminatory basis for the challenges or simply pretext."), *cert. denied*, 619 U.S. 1061, 136 L. Ed. 2d 618 (1997).

As made evident by our Supreme Court, the trial court's error requires remand for a new *Batson* hearing. *Hobbs*, 374 N.C. at 360, 841 S.E.2d at 504. "On remand, considering the evidence in its totality, the trial court must consider whether the primary reason given by the State for challenging juror [Smith] was pretextual. This determination must be made in light of all the circumstances" surrounding the State's use of its peremptory challenge. *Id.* at 360, 841 S.E.2d at 503. The trial court's order should demonstrate that the trial court considered all evidence presented by the parties, and evince the trial court's analysis in reaching its ultimate determination.

Conclusion

Defendant was not prejudiced by the trial court's denial of Defendant's motion to strike the initial jury panel due to an alleged, but unsubstantiated, violation of a statutory mandate.

Under the standard in *Hobbs*, the trial court erred in failing to make findings of fact and conclusions of law reflecting its analysis of the evidence in ruling upon Defendant's *Batson* challenge. We therefore remand this case to the trial court with instructions to conduct a *Batson* hearing consistent herewith and to enter an order containing the requisite findings of fact and conclusions of law.

NO ERROR IN PART; REMANDED FOR REHEARING.

Judges TYSON and BROOK concur.

STATE OF NORTH CAROLINA
v.
DMARLO LEVONNE FAULK JOHNSON, DEFENDANT

No. COA19-191-2

Filed 1 September 2020

1. Homicide—felony murder—assault on a law enforcement officer—general intent crime—diminished capacity—defense not available

Any error in the trial court's denial of defendant's motion for a continuance requesting more time to prepare for the State's rebuttal of his diminished capacity defense was not prejudicial where the jury found defendant guilty of felony murder with the underlying felony of assault on a law enforcement officer—a general intent crime, for which the defense of diminished capacity is not available.

2. Criminal Law—continuance motion—denied—right to present a defense

In a prosecution for armed robbery (a specific intent crime), the trial court did not err by denying defendant's continuance motion requesting more time to review certain evidence (recordings of jailhouse phone calls) that the State intended to use to rebut his diminished capacity defense—or by admitting that evidence at trial. Even though the State notified defendant of its intent to use the evidence

only the day before trial, defendant was not deprived of his constitutional right to present his defense because defense counsel knew of the recordings' existence for many months before trial and defendant failed to show any prejudice resulting from the alleged errors.

Judge STROUD dissenting.

Appeal by Defendant from judgment entered 12 May 2017 by Judge Rebecca W. Holt in Durham County Superior Court. Heard in the Court of Appeals 16 October 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sandra Wallace-Smith, for the State.

Rudolf Widenhouse, by M. Gordon Widenhouse, Jr., for Defendant.

DILLON, Judge.

Defendant Dmarlo Johnson appeals from a final judgment entered in superior court finding him guilty of first-degree (felony) murder and robbery with a dangerous weapon. After careful review, we conclude that Defendant received a fair trial, free from reversible error.[1]

I. Background

On 4 July 2015, Defendant robbed a convenience store, fatally shot the store clerk, and then assaulted a law enforcement officer with his gun as he was exiting the store. There is no dispute that Defendant was the perpetrator or that Defendant was legally sane that day. Rather, Defendant claims he acted with diminished capacity.

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1. Defendant was represented by appellate counsel when the records and briefs were filed. After the record and all briefs, including Defendant's reply brief, had been filed, on 19 August 2019, Defendant filed a pro se Motion for the Replacement of Appellate Counsel. On 28 August 2019, this Court dismissed the motion without prejudice based upon N.C. Gen. Stat. § 7A-498.8(b)(1). This case was heard without oral argument, so Defendant's appellate counsel had already completed everything needed for this case to be decided prior to the filing of Defendant's pro se motion. Defendant's counsel then filed a Motion to Withdraw as Appellate counsel and Defendant filed a Motion for Appointment of Counsel. We originally filed an opinion in this matter on 16 June 2020 and denied Defendant's Motion for Appointment of Counsel. Upon motion of the appellate counsel on behalf of Defendant to withdraw the opinion, we have withdrawn the original opinion and filed this new opinion solely to address Defendant's Motion for Appointment of Counsel. This footnote is the only substantive change to the opinion. We grant Defendant's Motion for Appointment of Counsel for any further proceedings in our appellate court system.

Prior to the 2015 robbery/shooting, Defendant was identified as a man of below-average intelligence, who suffered from bipolar disorder and depression.

On 3 July 2015, the day before the robbery/shooting, Defendant drove recklessly by "doing donuts" near a crowd of people and then eluding police. He was cited later that day for the incident.

On 4 July 2015, in the early morning hours, Defendant entered a convenience store with his face covered. Much of what transpired while he was there was recorded by security cameras. Defendant threatened the customers inside, ordering them to leave. The store clerk, Amer Mahmood, remained in the store. Defendant stole money from the cash register, items from the store, and Mr. Mahmood's wallet. At some point Mr. Mahmood recognized Defendant, calling him "Marlo." Shortly after being recognized by Mr. Mahmood, Defendant shot Mr. Mahmood six times, mortally wounding him.

Defendant exited the store and placed stolen items in his car. He then returned to shoot out surveillance cameras. As Defendant was returning to his car, he encountered police officers. He refused orders to drop his gun, pointing the gun at one of the officers. A series of gunshots from Defendant and the officers ensued. Defendant was subdued after being struck. Defendant was taken to the hospital, where he was treated for his wounds.

Days later, Defendant was formally arrested and held in custody while awaiting trial.

On 13 August 2015, about six weeks after the robbery/shooting, Defendant was first examined by a Dr. Corvin, his expert who would testify at trial concerning his diminished capacity. Over the course of the next several months, Dr. Corvin developed his diagnosis that Defendant suffered from bipolar disorder, which caused Defendant to act with diminished capacity when Defendant killed Mr. Mahmood.

On 23 April 2017, the day before the trial was to begin, the State informed Defendant of its intent to introduce certain evidence to rebut Dr. Corvin's testimony. This rebuttal evidence consisted of recordings of certain jailhouse calls made by Defendant around the time he first met with Dr. Corvin in August 2015, which the State contended demonstrated that Defendant showed no signs of diminished capacity.

The next day, on the first day of trial, Defendant's counsel sought a continuance to allow time to review the rebuttal evidence or, in the alternative, a ruling not to allow the State to introduce the recordings as rebuttal evidence. The trial court denied Defendant's requests.

The trial lasted several weeks. On 9 May 2017, after Dr. Corvin testified concerning Defendant's bipolar disorder, the State introduced the recordings in rebuttal to Dr. Corvin's testimony over Defendant's objection.

On 12 May 2017, the jury returned guilty verdicts for felony murder and for armed robbery. The trial court sentenced Defendant to life without parole on the murder conviction and a term of years on the robbery conviction, to run consecutively with his life sentence.

Defendant timely appealed.

II. Argument

On appeal, Defendant argues that the trial court erred in denying his request for a continuance made at the start of trial. Further, Defendant argues that the trial court's error was a *constitutional* error in that Defendant's trial counsel was denied the opportunity to prepare an adequate defense to respond to the State's rebuttal evidence:

> Finally, the gravity of harm [Defendant] would suffer without the continuance was substantial. He faced a sentence of life without parole. His capacity at the time of the crimes was central to the case. The telephone calls were introduced to undermine [Defendant's] mental health defense. Denying counsel time to prepare to deal with these telephone calls was untenable.

We address Defendant's argument as it pertains to each of his convictions in turn.

A. Felony Murder Conviction

[1] As explained below, based on controlling jurisprudence, we must conclude that Defendant is not entitled to a new trial on his felony murder conviction. Specifically, because the underlying felony supporting the jury's felony murder conviction was a "general intent" crime, Dr. Corvin's testimony concerning Defendant's diminished capacity was not relevant to this conviction.

The jury was presented with three theories by which they could convict Defendant of first-degree murder for fatally shooting Mr. Mahmood. The jury rejected the State's theory that Defendant killed Mr. Mahmood based on *premeditation and deliberation*. However, the jury found Defendant guilty based on the two other theories, each of which is based on the felony murder rule. First, the jury determined that Mr. Mahmood's death was sufficiently associated with Defendant's commission of armed robbery. Second, the jury determined that Mr.

Mahmood's death was sufficiently associated with Defendant's assault on a law enforcement officer with a deadly weapon as he was exiting the convenience store.

The trial court sentenced Defendant to a term of life imprisonment for felony murder based on the jury's finding that the killing was sufficiently associated with Defendant's assault on a law enforcement officer with a deadly weapon. The jury separately convicted Defendant of this underlying felony; however, since that felony was used to elevate the killing to felony murder, the trial court arrested judgment on that underlying conviction.

Our Supreme Court has held that the felony of assault with a firearm upon a law enforcement officer is a *general intent* crime for which the diminished capacity defense[2] is not available:

> [A]ssault with a firearm upon a law enforcement officer in the performance of his duties . . . may be described as a general-intent offense.
>
> * * *
>
> Accordingly, we now hold that the diminished-capacity defense is not available to negate the general intent required for a conviction of assault with a deadly weapon on a government officer.

State v. Page, 346 N.C. 689, 700, 488 S.E.2d 225, 232 (1997). And our Supreme Court further held that diminished capacity is not a defense to a felony murder conviction based on that underlying general intent felony:

> We allow defendants to assert diminished mental capacity as a defense to a charge of premeditated and deliberate murder because we recognize that some mental conditions may impede a defendant's ability to form a specific intent to kill. This reasoning is not applicable to the knowledge element of the felony of assault with a deadly weapon on a government officer.

Id. at 699, 488 S.E.2d at 232 (citation omitted).

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2. We note that the jury was not instructed on the defense of insanity, which would be a complete defense to all the charges for which Defendant was convicted, even a conviction for general intent crimes. Indeed, Defendant made no argument before the jury nor makes any argument on appeal that he was legally insane when he killed Mr. Mahmood and stole from him and the store. Defendant merely asserts that he acted with diminished capacity when he committed those acts, and it was this defense on which the jury was instructed.

Here, Defendant makes no argument on appeal concerning his conviction for the felony of assault with a deadly weapon on a law enforcement officer or the use of *that* felony to support his felony murder conviction. Therefore, based on Supreme Court precedent, we must conclude that any error by the trial court in not allowing Defendant time to prepare for the State's rebuttal of his defense is non-prejudicial, no matter our standard of review.

B. Armed Robbery Conviction

[2] The jury convicted Defendant of armed robbery. The trial court sentenced Defendant to a term of imprisonment to run consecutively to his life sentence for the felony murder conviction.

Armed robbery is a specific intent crime. *See State v. Lunsford*, 229 N.C. 229, 231, 49 S.E.2d 410, 412 (1948) (explaining that the State must prove that the defendant had the specific intent to steal). Therefore, diminished capacity is a defense to this felony. Accordingly, Defendant's arguments on appeal regarding the State's rebuttal evidence to Dr. Corvin's testimony are relevant to his armed robbery conviction, and we address them below.

On appeal, Defendant argues that he was prejudiced when the State was allowed to introduce recordings of nine (9) jailhouse phone calls he made around the time he met with Dr. Corvin. Defendant also argues that he was prejudiced when the trial court denied his motion for a continuance to allow his counsel time to prepare to respond to those nine (9) calls. For the reasoning stated below, we conclude that the trial court did not err in denying Defendant's motion to continue or in overruling Defendant's objection to the State's rebuttal evidence.

The circumstances regarding the introduction of the State's rebuttal evidence are as follows:

Dr. Corvin first met with Defendant on 13 August 2015, weeks following the killing, while Defendant was in custody. During that time, Defendant had made a number of jailhouse phone calls, some to his girlfriend, who would be a witness for him at trial. Defendant and his counsel were aware that these calls were being recorded. In any event, many months prior to trial, Defendant's counsel noticed their intent to assert various diminished capacity defenses.

Shortly before trial, the State came into possession of the 835 recorded phone calls Defendant had been a party to while in custody. These calls were made available to Defendant's counsel. The State considered using some of the jailhouse calls made by Defendant to his

girlfriend, but then decided against it. Defendant's defense team decided not to review any of the calls or ask for a continuance for more time to review the calls to see if there was evidence helpful to Defendant's diminished capacity defense.

However, just before the day of trial, after previously telling Defendant's counsel that they did not intend to use any of the recordings, the State prosecutors determined that they did intend to use some of the calls as rebuttal to any testimony Dr. Corvin might give; specifically, certain calls made the day before, the day of, and the day after Dr. Corvin's first examination of Defendant. The prosecution indicated that the calls were relevant to show Defendant's mental capacity during the time Defendant was examined by Dr. Corvin. Upon learning of the State's intent to use these calls (fewer than thirty) as rebuttal evidence, Defendant's counsel sought a continuance on the first day of trial to be allowed to listen to all 835 calls made by Defendant over the period of several months. The trial court denied the motion.

The trial began and centered largely on Defendant's state of mind around the time he killed Mr. Mahmood. The State put on evidence of Defendant's theft and killing at the convenience store, including video evidence from the surveillance cameras that caught much of Defendant's actions. This evidence tended to show that Defendant ordered customers out of the store, he ordered the store clerk Mr. Mahmood to remain behind the counter, he shot Mr. Mahmood when Mr. Mahmood called Defendant by name, and he shot out a surveillance video camera.

Defendant put on evidence which tended to show Defendant had below average intelligence, that he had suffered and had been treated for mental disorders, that he was acting rashly in the days and hours leading up to the killing, and that he was under the influence of alcohol and drugs at the time of the killing.

Defendant called Dr. Corvin, who testified concerning his evaluation of Defendant, including his initial meeting with Defendant on 13 August 2015. Dr. Corvin testified that Defendant was very moody during their first encounter. He testified that this initial meeting alone did not reveal to him a man who suffered from bipolar disorder, but rather a man with

> an antisocial personality disorder, the kind of guy who takes advantage of people, et cetera[.] Not that much we can really do about that. And trust me, as a forensic psychiatrist, I spend a lot of my time in prison. We see plenty of those folks, and it is what it is, and knowing nothing more other than what I saw of him in August of

> 2015, that's kind of what I [and the other doctors treating Defendant] thought[.]

He testified that over time after his initial meeting and after reviewing Defendant's medical records, he opined that Defendant suffered from bipolar disorder. He testified that Defendant's disorder combined with Defendant's ingestion of alcohol and drugs on the day of the shooting caused Defendant to act with diminished capacity.

The State, in rebuttal, presented a court-appointed expert, who testified that Defendant had below average intelligence; that Defendant was not bipolar but rather suffered from alcohol and cocaine substance abuse disorder; that though Defendant was intoxicated during the shooting, he was not impaired (based on her viewing of the surveillance video); and that Defendant had the ability to form the specific intent to kill during the shooting.

The State, in rebuttal, also introduced nine (9) jailhouse calls – the calls which are the subject matter of Defendant's arguments on appeal – that Defendant made around the time he first met with his expert Dr. Corvin. The State introduced these calls to show Defendant's mental ability around the time he met with Dr. Corvin. Quoting Defendant's brief, "[t]he calls indicated he was planning things, such as trying to make bond. He discussed a bond with his mother. He spoke to a bondsman. He added up money correctly."

The case was given to the jury, which found Defendant guilty of felony murder, felony assault on an officer with a deadly weapon, and armed robbery.

Ordinarily, "a motion for a continuance is . . . addressed to the sound discretion of the trial judge" and will not be disturbed on appeal "absent gross abuse." *State v. Searles*, 304 N.C. 149, 153, 282 S.E.2d 430, 433 (1981) (citations omitted). However, "when such a motion raises a constitutional issue, the trial court's action upon it involves a question of law which is fully reviewable by an examination of the particular circumstances of each case." *Id.* at 153, 282 S.E.2d at 433 (citation omitted). And "the constitutional guarantees . . . include the right of a defendant to have a reasonable time to investigate and prepare his case." *Id.* at 153-54, 282 S.E.2d at 433 (citations omitted). *See State v. Rogers*, 352 N.C. 119, 124, 529 S.E.2d 671, 675 (2000) (stating that defense counsel "shall have a reasonable time to investigate, prepare, and present his defense"); *see also State v. Tunstall*, 334 N.C. 320, 328, 432 S.E.2d 331, 336 (1993).

Here, we conclude that the trial court's denial of a continuance did not deprive Defendant of his constitutional right to present his defense for a number of reasons.

First, Defendant's counsel knew for quite a while that recordings of these calls existed. Counsel had plenty of time to request the recordings if they thought there was any evidence contained therein tending to bolster their defense that Defendant suffered from bipolar disorder. Such evidence (if it exists) did not suddenly become relevant to Defendant's case when the State informed Defendant's counsel that they planned to use some of the calls as rebuttal to Dr. Corvin's testimony. Such evidence was relevant all along in Defendant's case. If Defendant's counsel thought there might be evidence on those calls, recordings which involved Defendant and Defendant's family and which Defendant's counsel knew existed for many months, they should have been more diligent in seeking a continuance, not waiting until the eve of trial. *See Tunstall*, 334 N.C. at 328, 432 S.E.2d at 336.

Second, Defendant has failed to show any prejudice. *See Searles*, 304 N.C. at 153, 282 S.E.2d at 433 ("Denial of a motion for a continuance, [even a motion raising a constitutional issue], is, nevertheless, grounds for a new trial only upon a showing by defendant that [he] was prejudiced thereby.").

Here, Dr. Corvin testified that he did not pick up on Defendant's bipolar disorder during his meeting in August 2015, but initially thought Defendant was antisocial and also a person who takes advantage of others. He only later concluded that Defendant was bipolar, indicating that Defendant suffered from mood swings that, at times, caused him to act impulsively or without specific intent. But the State's introduction of the phone calls made around the day Dr. Corvin met with Defendant did not contradict what Dr. Corvin testified he saw of Defendant during their initial meeting, a person who could plan. And these calls do not contradict Dr. Corvin's testimony that Defendant suffers from bipolar disorder and could act with diminished capacity at times, especially during extreme manic periods heightened by being under the influence of impairing substances. That is, Dr. Corvin did not testify that Defendant's bipolar disorder caused Defendant to act with legal diminished capacity at the time he first met him in August. He testified that due to his bipolar disorder and being under the influence of impairing substances, Defendant acted with diminished capacity, unable to form a specific intent, when he shot and stole from Mr. Mahmood.

Also, the State's focus during its closing focused more on the evidence concerning Defendant's state of mind when he was in

the convenience store, *as exhibited on the surveillance tapes*, rather than on what Defendant's mental capacity was on the day of his meeting with Dr. Corvin. That is, the jury made its finding that Defendant did not act with diminished capacity based on what they saw on the surveillance tapes of the crime rather than how Defendant sounded on some phone calls six weeks later.

And finally, Defendant has not made any showing that any of the 835 calls would have actually been helpful in addressing the State's rebuttal evidence. Indeed, in *Searles*, our Supreme Court held that the trial court did not constitutionally err in denying a motion to continue to allow the defendant's counsel to review newly-discovered evidence where the defendant failed to show on appeal what this evidence would show and how it would, in fact, be material. *See Searles*, 304 N.C. at 154, 282 S.E.2d at 434. *See also State v. Phillip*, 261 N.C. 263, 267, 134 S.E.2d 386, 390 (1964) (stating that "a postponement is [only] proper where there is a belief that material evidence will come to light and such belief is reasonably grounded on known facts").

III. Conclusion

We conclude that Defendant received a fair trial, free from reversible error. Defendant fails to make any argument showing reversible error in his conviction for felony murder where the underlying felony is a general intent crime.

As to Defendant's conviction for armed robbery, a specific intent crime, we conclude that the trial court did not commit reversible error in denying Defendant's motion for a continuance or otherwise allowing the State to offer its rebuttal evidence. There was strong contradictory evidence offered by both the State and Defendant's counsel as to whether Defendant acted with diminished capacity. The jury heard the evidence and made their decision.

NO ERROR.

Judge BERGER concurs.

Judge STROUD dissents, writing separately.

STROUD, Judge, dissenting.

I respectfully dissent because the majority fails to apply the correct standard of review, and, under that standard, Defendant is entitled

to a new trial. Defendant asserted both at trial and on appeal constitutional arguments to support his motion to continue. "A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." N.C. Gen. Stat. § 15A-1443(b) (2017). The majority shifts this burden to Defendant and finds the phone calls used by the State were merely "rebuttal evidence." But the importance of evidence is not determined by whether it is in the case in chief or rebuttal; indeed, rebuttal evidence can be the most significant, particularly when a defendant has no opportunity to respond to it. As Defendant's brief accurately noted, by using the phone calls as rebuttal, "the state made sure the disputed telephone calls were the very last items of evidence the jury heard and considered before it began its deliberations." And because Defendant presented evidence at trial, the State also had the benefit of the final argument to the jury, leaving Defendant with no opportunity to respond to the State's arguments regarding the jail calls. *See* Gen. Rules of Practice for the Super. & Dist. Ct., R. 10, 276 N.C. 735, 738 (1970) ("In all cases, civil and criminal, if no evidence is introduced by the defendant, the right to open and close the argument to the jury shall belong to him.").

The issue at trial, and in this appeal, is not whether Defendant was the person who robbed the convenience store and fatally shot the clerk. The only real issues at trial were Defendant's capacity and state of mind at the time of the shooting, 4 July 2015. Those issues are relevant to the jury's determination of his intent and the exact crimes for which he could be convicted. Even assuming the jury would have convicted Defendant of some crime, the difference between a sentence for first degree murder and second degree is not insignificant.[1] The jury found Defendant not guilty of first degree murder based on malice, premeditation, and deliberation, but guilty of first degree murder based on the felony murder rule based upon robbery with a firearm and assault with a firearm on a law enforcement officer.

I. Factual Background on State's Intent to Use Jail Calls as Evidence and Defendant's Objections

The majority glosses over the actual timing of the production of the phone calls and the State's repeated assurances it did not intend

1. Based upon Defendant's intellectual disability, mental illness, and impairment by alcohol and drugs, his trial counsel argued at trial that Defendant should be convicted only of second degree murder.

to use *any* of the phone calls. The majority also relies upon the State's evidence of Defendant's commission of the crimes, especially the video surveillance tapes, which it states show "Defendant's state of mind when he was in the convenience store[.]" The majority does not explain how a *video* can show a "state of mind" as relevant to this case. A video of a person shooting in a convenience store would not necessarily look any different whether the shooting was committed by a person suffering from a severe mental illness or incapacity as opposed to a person of average intelligence and unimpaired mental capacity. But even if the video may show indications of "state of mind" as relevant to Defendant's alleged incapacity, the video surveillance from the convenience store *was* interpreted differently by the two expert witnesses testifying about their evaluations of Defendant. The video surveillance alone does not weaken or eliminate Defendant's arguments. The differing interpretations of the video by Defendant's expert and the State's expert actually strengthens Defendant's arguments on appeal, since the State used the phone calls solely to attack the evaluation by Defendant's expert.

Around 6:00 PM on the Sunday evening before trial was to begin, the State notified Defendant's counsel it would be using twenty-three phone calls as evidence. Before the trial began, Defendant moved to exclude the phone calls or continue the trial so his counsel would have an opportunity to prepare for trial by listening to the phone calls. Defendant's "first request" was that the trial court "exclude those phone calls and allow us to proceed[;]" in the alternative, he requested "to continue the matter so that I can prepare this case like it should be prepared. It's a first-degree murder case, and we're dealing with a lot of complicated mental health issues here." Defendant's counsel argued, "My client's right to due process will be violated by the admission of these phone calls. He has a right to an effective assistance to counsel is [sic] going to be affected. His right to confront witnesses is going to be affected." Defendant's counsel invoked his right under both the United States and North Carolina Constitutions. *See* U.S. Const. amends. V, VI, XIV; N.C. Const. art. I, §§ 19, 23. He raised his constitutional objections and motion to continue both before trial and again after jury selection. He also renewed the objections when the phone call evidence was presented.

A full understanding of the relevance of the phone calls used by the State and the potential prejudice to Defendant requires some background information regarding Defendant's psychiatric evaluation. Defendant was evaluated by Dr. George Corvin, a general forensic psychiatrist, on 13 August 2015, about a month and a half after the shooting. At this time, Defendant was not yet on medication for his mental illness,

although he had previously been diagnosed and treated prior to the shooting.[2] Dr. Corvin diagnosed Defendant with Bipolar I disorder; cannabis, alcohol, and cocaine use disorders; mild intellectual developmental disorder; and neurodevelopmental disorder (fetal alcohol syndrome) related to his mother's known use of alcohol during her pregnancy with Defendant. On 19 July 2016, Defendant filed his notice of defense under North Carolina General Statutes §§ 15A-905, 959:

> 1) Mental infirmity and diminished capacity under GS 15A-959 (b); and
>
> 2) Mental infirmity and insanity under GS 15A-959 (a); and
>
> 3) Voluntary intoxication
>
> These defenses are based upon the defendant's state of mind at the time of the offense including a mood disorder, his use of alcohol and drugs, and his impaired neurocognitive functioning and intellectual disabilities.

Around the same time, Defendant also provided the State with Dr. Corvin's report.

Almost a year after the State received Dr. Corvin's report, trial was set to begin on 24 April 2017. On Thursday, 13 April 2017, the State disclosed to Defendant's counsel written summaries of interviews with some potential new witnesses it intended to call to testify and a disc which the prosecutor "represented . . . were jail phone calls allegedly from [Defendant] to various people." Neither Defendant's counsel nor his investigator were able to open the disc due to the file format. 14 April 2017 was Good Friday, a state holiday.

On Monday, 17 April, Defendant's counsel contacted the prosecutor and got a disk with a different file format. His investigator opened the disk and discovered it contained approximately 335 recorded telephone calls Defendant made from jail. At 9:28 AM on Tuesday, 18 April, Defendant's counsel emailed the prosecutor regarding the phone calls:

> Yesterday afternoon we received a copy of the jail call disc in a format that we could open and I will not have time to listen to them and do not think I have anyone in my office that can assist. Please let me know if there are any calls which you believe are somehow relevant to your case.

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2. By the time the State's expert witness evaluated Defendant, he had been on medication for months. At trial, Dr. Laney, a psychologist, testified that she did not believe Defendant was actually suffering from bipolar disorder, despite his prior diagnosis by other psychiatrists and continued treatment for the disorder.

At 12:50 PM the same day, the prosecutor responded to the email, assuring Defendant's counsel "I haven't listen [sic] to most of [the phone calls]" and "*[a]t this time I do not intend to use any of those calls, and I am no longer requesting anyone to continue listening to the calls*." (Emphasis added.)

On Thursday, 20 April 2017, the State provided to Defendant's counsel another disc with "550 +" *additional* phone calls. At 11:13 AM, Defendant's counsel emailed the prosecutor again:

> My office just picked up the disc with 550 + phone calls. I am assuming that your earlier email applies and these were just more calls from your earlier request. Let me know if my assumption is incorrect.

At 6:25 PM the same day, the prosecutor responded, confirming his prior email stating that the State did not intend to use any of the phone calls:

> *I do not intend to introduce any of the jail calls.* These calls were requested at a different time from the other calls; however, the delay in receiving the calls was even greater than the delay related to the prior calls that were delivered to you.

Based upon this assurance, Defendant's counsel and his investigator stopped listening to the phone calls to focus on other information provided by the State that same week. Along with the phone calls, the prosecutor also provided to Defendant's counsel information regarding a new witness, Mr. Saeed, the decedent's former roommate. Defendant's counsel determined he would need to talk to Mr. Saeed and "spent a good part of [the week prior to trial] . . . maybe even a day and a half, two days, looking for Mr. Saeed." Then later in the week, the State provided yet another more detailed statement from Mr. Saeed and a statement from another new witness, Mr. Chaudry. Police officers had talked to Mr. Chaudry, the owner of the convenience store, the night of the shooting. Defendant's counsel noted that although the police "had plenty of contact with Mr. Chaudry 20 some months ago, and now we're getting statements from Mr. Chaudry."[3] In his argument to the trial court, Defendant's counsel noted that

> all these statements came about approximately 21 to 22 months after this offense occurred, statements by a

3. The State identified 45 potential witnesses at the start of the trial, and 21 witnesses testified for the State.

> witness that people knew but nobody ever bothered to talk to. . . . and that's kind of going on the same time as these phone calls being given to me.

Thursday, 20 April 2017, was the last day Defendant's investigator, Mr. McGough, was available to assist with trial preparation "because he was pretty sick and didn't come to work the next day." He was out with pneumonia until "sometime after trial began."

On Sunday, 23 April 2017, the prosecutors[4] were working on the case and as Assistant District Attorney Dornfried explained to the trial court, he suddenly had an idea of a way to attack Dr. Corvin's evaluation of Defendant:

> it just had dawned on me we do have recordings or we might. I didn't know if we did or not, but we might have recordings of the defendant, which is the jail calls that had been pulled not for the purposes of determining what is condition was like around the time Dr. Corvin was interviewing him and evaluating him[.5]

At 5:50 PM, the prosecutor emailed Defendant's counsel to inform him that contrary to his prior email, he now intended to use some of the phone calls. The email also explained the potential relevance and importance of the particular phone calls the State intended to use.

> After we confirmed yesterday that Dr. Corvin did not make any recordings of the Defendant on the day that he saw him exhibiting unusual behaviors, we didn't think more of the issue. *Today, it occurred to us that there are recordings of the Defendant on that day, although not with Dr. Corvin. The recordings are of the jail calls. We have listened to some jail calls and decided that they are relevant material to his state of mind as well as his memory of the night of the murder.*
>
> The jail calls that are from August 12 - August 14, 2015 are calls numbered 251 - 274. We do not intend to use the calls that only constitute phone sex or involve the Defendant's child. You can tell the call numbers by clicking on the icon

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4. The State had two attorneys working on the case and both were present for the entire trial. Defendant had only one court-appointed attorney.

5. The State had gotten the recordings to see if Defendant had discussed the events with his girlfriend but were unable to find any such conversations.

> and going to properties and index. You can print the call log at the very bottom of the folder to line the call numbers up with the phone numbers date and time.

(Emphasis added.) The twenty-three phone calls the prosecutor initially identified as calls which may be used as evidence lasted approximately three and a half hours.

In the hearing before trial, after arguments from Defendant and the State, the trial court denied Defendant's motion to continue and ordered the State could introduce only the twenty-three phone calls identified in the Sunday night email but only during rebuttal and not as part of its case-in-chief, in accord with how the State had announced it intended to use the calls. The trial court did not limit the Defendant in using the phone calls, but since Defendant's sole attorney was representing him in trial, his counsel had no meaningful opportunity to listen to even twenty-three phone calls—and certainly not over 800 calls—or to prepare to use them. Based upon the estimates of the average length of each call, it would take between 95 and 140 hours to listen to all the phone calls.

Jury selection ended on Friday 28 April at 11:28 AM. Defendant's counsel requested to adjourn until Monday so he could have an opportunity to listen to the phone calls over the weekend before opening statements. He wanted a chance to consult with his "mental health professionals" about the calls as well. The State opposed Defendant's request because it had a witness from out of state and hoped to complete the witness's testimony so he could take a flight home that afternoon. The trial court denied Defendant's motion, immediately empaneled the jury, and proceeded to opening statements.

Defendant again renewed his objections to the State's use of the jail phone calls before the State's presentation of the evidence on rebuttal. Defendant's counsel noted that he had still not had time to prepare for the State's use of the calls on rebuttal or to prepare any surrebuttal. He had listened to some of the calls but had no opportunity to go over the calls with his expert witnesses or to determine how to use any calls.

Although the majority does not appreciate the significance of Defendant's need to listen to the calls and to prepare for the rebuttal evidence identified by the State the evening before trial, the State's brief does, and the State attempts to explain why Defendant was not prejudiced by his counsel's inability to prepare. The State argues others assisting Defendant's counsel could have listened to the calls *during* the trial. The State's brief repeatedly refers to the "defense team" but cites to only

one portion of the transcript in support of this assertion. For example, the State argues, "Where the record shows that the defense team consisted of two investigators and three attorneys, there was ample time for his team to review the telephone calls in question and confer with their mental health expert about them." But the record does not show a "defense team" with several attorneys available to provide assistance during trial. Defendant accurately points out that "the record belies this argument. Defense counsel did not have co-counsel. The other attorneys who were periodically in court with him were either new to the office or just observing. The lead investigator had been sidelined by pneumonia and the other investigator was merely providing rote assistance."[6]

The State also argues that "Defendant was personally aware of the content of the calls he made." The State seeks to compare Defendant's awareness of his phone calls to the defendant's knowledge of two brief oral statements in *State v. Tunstall*:

> The record does show that the defendant's counsel received tardy notice—less than a week before the defendant's trial began—of two oral statements made by the defendant. These statements consisted of (1) the defendant's statement to Deputy J.A. McCowan, "I shot the mother f——er, he's over there dead" and (2) the defendant's statement to Auxiliary Deputy Ronnie Baskett, "I hope I killed the mother f——er." The defendant's counsel had at least three days between notification of these statements and the beginning of jury selection in the defendant's trial in which to investigate the circumstances under which the statements were made. The defendant has not shown that additional time would have enabled his counsel to better confront the witnesses who testified that the defendant made these statements.

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6. During Defendant's argument renewing his objections prior to the State's presentation of rebuttal evidence, the trial court inquired about other members of the "defense team" in the courtroom during portions of the trial. Defendant's counsel explained that one attorney sat in "helping me with voir dire" but did not "know anything about the case." Another attorney was a "brand-new lawyer in our office" who was only there to observe. Mr. McGough was the primary investigator for Defendant's counsel, and his absence due to pneumonia had already been noted at the beginning of the trial. The other investigator was Ms. Winston, who "had very limited involvement in this case. Really last week was probably -- she got involved helping me when Mr. McGough came down with pneumonia." The State did not refute any of Defendant's arguments regarding the nonexistence of a "defense team" at trial. The transcript and record confirm that only one attorney appeared as trial counsel for Defendant, from appointment of counsel until his notice of appeal.

334 N.C. 320, 332, 432 S.E.2d 331, 338 (1993). There was no need for an expert witness to address the relevance of those two brief statements. In addition, the two statements in *Tunstall* were presented during the State's evidence—not during rebuttal—so the defendant's counsel had the opportunity to address the late disclosure of the statements and "reveal the weaknesses" in the testimony of the officers, as noted by the Supreme Court:

> On cross-examination, both McCowan and Baskett admitted that they had not told the prosecutor about the defendant's statements until the week before his trial. Both witnesses also admitted that they had not reduced the defendant's statements, made nearly eleven months earlier, to writing. Far from being unprepared to confront these witnesses, the defendant's attorney skillfully revealed to the jury the weaknesses in their testimony.

Id.

Tunstall is inapposite to this case. The State's argument assumes Defendant, despite his uncontested intellectual disability and illiteracy, could recall over 800 phone calls *and* could also appreciate and explain to his counsel the potential relevance of the particular calls identified by the State in the context of Dr. Corvin's psychiatric evaluation of his mental capacity.[7] Defendant's counsel had no co-counsel to assist during the trial by listening to the calls or developing any additional evidence based upon the calls and his primary investigator was sick during the times he might have been able to provide meaningful assistance. But again, the trial court denied all of Defendant's objections to the State's use of the phone calls on rebuttal.

In summary, the State had notice of Dr. Corvin's report, and the dates of his evaluations of Defendant, for over a year before trial. The State assured Defendant's counsel—who was trying to prepare for a murder trial where the State had identified 45 potential witnesses—it would not use any of the jail phone calls during the trial. The prosecutor specifically stated, "I am no longer requesting anyone to continue listening to the calls" on the Tuesday before trial and confirmed this again on Thursday evening. But on the very eve of trial, the State changed its position and stated it would use some of the phone calls as evidence.

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7. The State's expert witness agreed with Defendant's expert witnesses as to his intellectual disability. Defendant never learned to read or write and functioned at second-grade level.

I also note I am baffled by one of the majority's arguments which states, "If Defendant's counsel thought there might be evidence on those calls, recordings which involved Defendant and Defendant's family and which Defendant's counsel knew existed for many months, they should have been more diligent in seeking a continuance, not waiting until the eve of trial." The State does not dispute the timeline described above. Certainly, Defendant was aware he made phone calls while he was in jail, but even the State had been unable to get access to these recordings until shortly before trial. Actually, the *State* waited until Sunday evening—the day before trial—to advise Defendant it planned to use some of the approximately 800 phone calls, after specifically advising his counsel, twice, it would *not* use any of the calls. Defendant could not have requested a continuance based upon the State's intended use of the phone calls a moment sooner than he did, as he made his motion immediately upon the inception of the case on Monday morning.

II. Standard of Review

The majority states "any error by the trial court by not allowing Defendant time to prepare to address the State's rebuttal of his diminished-capacity defense is non-prejudicial, no matter our standard of review." Our Supreme Court has established the correct standard of review for this issue:

> It is well established that a motion to continue is ordinarily addressed to the trial judge's sound discretion and his ruling thereon will not be disturbed except upon a showing that he abused that discretion. However, *when a motion to continue is based on a constitutional right, the question presented is a reviewable question of law.* The denial of defendant's motion in this case presents constitutional questions.

State v. McFadden, 292 N.C. 609, 611, 234 S.E.2d 742, 744 (1977) (emphasis added) (citations omitted).

In this situation, the trial court's ruling on the motion to continue is reviewed as a "question of law that is fully reviewable on appeal by examination of the particular circumstances presented in the record." *State v. Blakeney*, 352 N.C. 287, 301-02, 531 S.E.2d 799, 811 (2000). The majority fails to review the ruling as a question of law or to examine the "particular circumstances presented in the record." *Id.* Our Courts have also noted the "particular importance" of the "reasons for the requested continuance presented to the trial judge at the time the request is

denied." *State v. Barlowe*, 157 N.C. App. 249, 254, 578 S.E.2d 660, 663 (2003) (quoting *State v. Roper*, 328 N.C. 337, 349, 402 S.E.2d 600, 607).

III. Analysis

Because Defendant preserved his constitutional arguments regarding his right to effective assistance of counsel, due process, and confrontation of witnesses, I will analyze the trial court's denial of his motion to continue *de novo*. First, the reason for the request was the *State's* last-minute decision to use evidence it had until the eve of trial assured Defendant's counsel it would not use. *See id.*

Where Defendant's motion to continue raised constitutional issues of confrontation and effective assistance of counsel, "the trial court's ruling is 'fully reviewable by an examination of the particular circumstances of each case.' " *State v. Rogers*, 352 N.C. 119, 124, 529 S.E.2d 671, 675 (2000) (quoting *State v. Searles*, 304 N.C. 149, 153, 282 S.E.2d 430, 433 (1981)). The Supreme Court in *State v. Rogers* explained the proper analysis for this motion to continue:

> In most circumstances, a motion to continue is addressed to the sound discretion of the trial court, and absent a manifest abuse of that discretion, the trial court's ruling is not reviewable. However, when a motion to continue raises a constitutional issue, as in the instant case, the trial court's ruling is "fully reviewable by an examination of the particular circumstances of each case." Generally, the denial of a motion to continue, whether a constitutional issue is raised or not, is sufficient grounds for the granting of a new trial only when the defendant is able to show that the denial was erroneous and that he suffered prejudice as a result of the error.
>
> The rights to effective assistance of counsel, to confrontation of accusers and witnesses, and to due process of law are guaranteed in the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States and Sections 19 and 23 of Article I of the Constitution of North Carolina. "It is implicit in the constitutional guarantees of assistance of counsel and confrontation of one's accusers and witnesses against him that an accused and his counsel shall have a reasonable time to investigate, prepare and present his defense." A defendant must "be allowed a reasonable time and opportunity to investigate and produce competent evidence, if he can, in defense

of the crime with which he stands charged and to confront his accusers with other testimony." This Court has previously recognized and discussed the United States Supreme Court's analysis of these claims:

> In addressing the propriety of a trial court's refusal to allow a defendant's attorney additional time for preparation, the Supreme Court of the United States has noted that the right to effective assistance of counsel "is recognized . . . because of the effect it has on the ability of the accused to receive a fair trial." While a defendant ordinarily bears the burden of showing ineffective assistance of counsel, prejudice is presumed "without inquiry into the actual conduct of the trial" when "the likelihood that any lawyer, even a fully competent one, could provide effective assistance" is remote. A trial court's refusal to postpone a criminal trial rises to the level of a Sixth Amendment violation "only when surrounding circumstances justify" this presumption of ineffectiveness.

"To establish a constitutional violation, a defendant must show that he did not have ample time to confer with counsel and to investigate, prepare and present his defense."

Id. at 124-25, 529 S.E.2d at 674-75 (alteration in original) (citations omitted).

The majority opinion assumes no prejudice to Defendant from the trial court's denial of continuance or disallowing use of the jail calls by the State, again failing to apply the proper standard. It is correct that even when the defendant raises a constitutional basis for the motion to continue, a new trial may be granted only if "denial was erroneous and that [defendant] suffered prejudice as a result of the error." *Id.* at 124, 529 S.E.2d at 675. But the *Rogers* court then explains that prejudice is *presumed* if

> "the likelihood that any lawyer, even a fully competent one, could provide effective assistance" is remote. A trial court's refusal to postpone a criminal trial rises to the level of a Sixth Amendment violation "only when surrounding circumstances justify" this presumption of ineffectiveness.

Id. (citation omitted) (quoting *Tunstall*, 334 N.C. at 329, 432 S.E.2d at 336).

Here, no lawyer of any level of competence could listen to the approximately three and a half hours of phone calls, and certainly not all 90 to 140 hours of calls, during a fifteen day murder trial, and then do any needed investigation based on the calls, and discuss the relevance of particular calls with expert witnesses to prepare for the rebuttal evidence. There are not enough hours in a day, and even competent counsel must sleep occasionally. Prejudice must be presumed because there was no likelihood Defendant's counsel could provide effective assistance. But Defendant does not rely just on a presumption of prejudice. His argument demonstrates the particular prejudice based upon the jury's verdict:

> Absent the inadmissible evidence from the nine telephone calls,[8] which the prosecutor played as its last evidence and emphasized in its closing argument, the jury might well have rejected robbery with a firearm and felony murder based on this underlying felony. In this way, the admission of the nine telephone calls, over defendant's continuous objections, likely prejudiced the jury on these other issues. The state certainly cannot show this error was harmless beyond a reasonable doubt.

In *State v. Barlowe*, this Court held the trial court erred by denying the defendant's motion to continue based upon his constitutional right to effective assistance of counsel where the State disclosed evidence of blood spatter and an expert report of bloodstain pattern analysis nine days before trial, 10 September 2001. 157 N.C. App. 249, 578 S.E.2d 660. Trial was to begin on 19 September 2001. *Id.* at 255, 578 S.E.2d at 664. Defendant's counsel made a motion to continue on 13 September 2001, noting his substantial but unsuccessful efforts to find a qualified expert available to review the blood-spattered pants and report before trial.[9] *Id.* This Court explained the correct analysis:

> The North Carolina Supreme Court has summarized the analysis applied by federal courts in reviewing

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8. The State limited the number of phone calls it would be using in rebuttal from twenty-three to nine on Monday May 8, which was day eleven of Defendant's fifteen-day trial.

9. The defendant's counsel's effort to have expert review was also impaired because there was at the relevant time "no commercial air traffic in the United States [due to the events of 11 September 2001] by which evidence and documents may be delivered to and from the expert that defendant selects." *Barlowe*, 157 N.C. App. at 255, 578 S.E.2d at 664 (alteration in original).

refusals to grant a continuance where a constitutional right is implicated:

> Courts have discussed numerous factors which are weighed to determine whether the failure to grant a continuance rises to constitutional dimensions. Of particular importance are the reasons for the requested continuance presented to the trial judge at the time the request is denied.

Id. at 253-54, 578 S.E.2d at 663 (quoting *State v. Roper*, 328 N.C. 337, 349, 402 S.E.2d 600, 607 (1991)).

> North Carolina courts have followed suit in analyzing similar alleged violations under our state constitution. Some of the factors considered by North Carolina courts in determining whether a trial court erred in denying a motion to continue have included (1) the diligence of the defendant in preparing for trial and requesting the continuance, (2) the detail and effort with which the defendant communicates to the court the expected evidence or testimony, (3) the materiality of the expected evidence to the defendant's case, and (4) the gravity of the harm defendant might suffer as a result of a denial of the continuance.

Id. at 254, 578 S.E.2d at 663.

Thus, this Court has a duty to consider the factors as noted in *Barlowe*. First is the "the diligence of the defendant in preparing for trial and requesting the continuance." *Id.* The State informed Defendant's counsel on the evening before trial of its intent to use evidence it had twice assured him it would not use to attack Defendant's only defense, his mental capacity at the time of the shooting. Defendant's counsel had reasonably relied upon the State's repeated written assurances it would not be using the phone calls and continued instead to prepare for the 45 witnesses the State had identified, including several disclosed just before trial. Defendant was diligent in preparing for trial and requested continuance as soon as humanly possible, when trial started. Defendant also requested in the alternative that the State not be permitted to use the phone calls; this would have allowed the trial to proceed with all of the evidence the State had planned to use until the Sunday evening before trial and with no disadvantage to Defendant. Defendant's counsel then requested additional time after jury selection to review the calls

before opening statements; this request was also denied. Defendant then renewed his objections before presentation of the rebuttal evidence and explained why he was still not prepared to address the evidence.

The second factor is "the detail and effort with which the defendant communicates to the court the expected evidence or testimony." *Id.* Defendant's counsel went into great detail and effort in his objections to the jail calls, as noted above. But Defendant's counsel could not possibly have listened to over 100 hours of calls while also representing Defendant in a murder trial continuously for fifteen days, nor could he arrange to have an expert listen to them, discuss the issues with the expert, and be prepared to respond. Defendant could not inform the court of what evidence he may discover based on the phone calls or what his expert witness's response would be, just as the defendant in *Barlowe* could not inform the court of what opinion another expert may have upon reviewing the blood spatter and the State's report. But the defendant in *Barlowe* was entitled to have time to get a review by a blood spatter expert so he could prepare for trial. *Barlowe* did not require the defendant to demonstrate the requested review by a blood spatter expert would be favorable to his case; such a standard would be impossible.

The third factor is "the materiality of the expected evidence to the defendant's case." *Id.* On the Sunday evening before trial, the State recognized that one of the most effective ways to rebut Dr. Corvin's testimony regarding Defendant's lack of capacity would be to attack the evaluation itself. The State could not legitimately refute that Defendant was intellectually disabled; its own expert agreed. The State attempted to refute Defendant's diagnosis of bipolar disorder, despite the fact that he had been diagnosed and treated for bipolar disorder before the shooting and his treatment resumed while he was in jail and continued through the time of trial.[10] The State could not refute that Defendant was impaired by alcohol, cocaine, and Benzodiazepine at the time of the shooting. The State could refute only the credibility and reliability of Dr. Corvin's report and his opinion on effects of these factors on Defendant's mental capacity. By attacking Dr. Corvin's evaluation with jail calls Dr. Corvin never had an opportunity to hear or respond to, the State sought to attack Defendant's only defense. The fact that the calls were used only as rebuttal evidence entirely eliminated Defendant's ability to respond.

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10. At sentencing, the trial court also recommended that Defendant "receive the benefit of mental healthcare treatment within the Department of Adult Corrections."

The last factor is the "the gravity of the harm defendant might suffer as a result of a denial of the continuance." *Id*. Defendant was unable to respond to the jail calls used to attack Dr. Corvin's evaluation. Because the evidence was presented in rebuttal, and Defendant's counsel had no opportunity to prepare any surrebuttal evidence, the State was able to attack his only defense. The majority does not appear to appreciate the potential significance of Defendant's inability to respond.

Prejudice is presumed if the likelihood that " 'any lawyer, even a fully competent one, could provide effective assistance' is remote." *Rodgers*, 352 N.C. at 124, 529 S.E.2d at 675 (quoting *Tunstall*, 334 N.C. at 329, 432 S.E.2d at 336). Defendant's counsel was fully competent, but he could not listen to over 100 hours of jail calls while he was the sole counsel of record representing Defendant in a jury trial. Nor could he do any investigation those calls may require or discuss the calls with Dr. Corvin or any other expert. No attorney could provide effective assistance under these circumstances. The only thing Defendant's attorney could do was preserve the issue for appellate review by objecting strenuously to the State's use of the jail calls, stating the constitutional basis for those objections, and renewing those objections at every opportunity during the trial. He did exactly that.

Under the correct standard of review, reviewing *de novo* the legal issue based upon all of the circumstances presented, I would hold the trial court erred in denying Defendant's motion to bar the State from using the jail calls identified as evidence the evening before the trial started, or, in the alternative, to continue the trial. Defendant was denied his right to effective assistance of counsel by his counsel's inability to review the jail calls or prepare for their use as needed for all stages of the trial: jury selection, opening arguments, examination of witnesses, preparing for the rebuttal evidence, and potential surrebuttal evidence. Because "the error amounts to a violation of defendant's constitutional rights, it is prejudicial unless the State shows the error was harmless beyond a reasonable doubt." *Barlowe*, 157 N.C. App. at 253, 578 S.E.2d at 662-63 (citing N.C. Gen. Stat. § 15A-1443(b) (2002)). "The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." N.C. Gen. Stat. § 15A-1443(b).

The State has not even attempted to address its burden of showing the error was harmless beyond a reasonable doubt. Instead, the State argues that "[u]nless defense can show that the prosecution acted in bad faith in not providing the phone calls earlier, such 'failure to preserve potentially useful evidence does not constitute a denial of due process of law.' *State v. Graham*, 200 N.C. App. 204, 209, 683 S.E.2d 437, 441

(2009)." Defendant has not argued the State acted in bad faith, and *State v. Graham* deals with an issue of sanctions for an alleged discovery violation where the State impounded the defendant's car in 1996 but "lost" it at some point before trial.

Here, the State candidly admitted it did not obtain the jail calls for the purpose of addressing incapacity but instead was attempting to find information regarding a particular witness, Defendant's girlfriend. Once the prosecutor determined that "we were not going to get any useful information" regarding the girlfriend, he "instructed people to stop listening to them" and informed Defendant's counsel he did not intend to use the jail calls. But on the Sunday before trial, it "dawned on" the prosecutor that "we do have recordings or we might" of Defendant on the day of his evaluation by Dr. Corvin. It took "quite a while" for the prosecutors to "figure out these jail calls as far as the dates that they were made" because the calls were in a different format than they have previously received. The State is correct there is no indication it acted in "bad faith" in changing its position as to use of the jail calls at the last minute, but the absence of bad faith does not change Defendant's counsel's ability to provide effective representation. In *Barlowe*, there was no indication of bad faith by the State in its failure to provide the blood-spattered pants or report regarding the evidence to defendant a few days before trial. 157 N.C. App. 249, 578 S.E.2d 660. The relevant inquiry was not why the State failed to produce the evidence earlier but the defendant's "lack of opportunity to refute this evidence by informed cross-examination of Agent Garrett, rebuttal of his testimony by someone qualified to express an opinion, or to provide other explanations for the presence of blood spatter on the pants[.]" *Id.* at 257, 578 S.E.2d at 665.

I therefore respectfully dissent and would hold the trial court erred in denying Defendant's motion to bar the State's use of the jail calls or in the alternative to continue the trial to allow counsel time to prepare for the use of the jail calls. I would grant Defendant a new trial.

STATE OF NORTH CAROLINA
v.
BILLY RUSSELL LAND

No. COA19-1060

Filed 1 September 2020

1. Contempt—summary direct criminal contempt proceeding—indigent defendant—statutory right to counsel

In a case of first impression, the Court of Appeals held that an indigent person's statutory right to counsel pursuant to N.C.G.S. § 7A-451(a)(1) did not apply in a summary direct criminal contempt proceeding.

2. Sentencing—errors in sentencing orders—clerical error—substantive change from sentence orally rendered in defendant's presence—remand

Two criminal contempt orders were remanded due to errors in sentencing. The first order was remanded for correction of a clerical error because the trial court orally announced a sentence of twenty-four hours in jail, but the court's written order sentenced defendant to thirty days. The second order was vacated and remanded for resentencing because defendant's right to be present during sentencing was violated. The court failed to specify in its oral pronouncement whether the sentence should run concurrently or consecutively, and there was no record of defendant being present when the order imposing a consecutive sentence was entered, which constituted a substantial change in the sentence.

Appeal by Defendant from Orders entered 29 July 2019 by Judge Angela Puckett in Forsyth County Superior Court. Heard in the Court of Appeals 9 June 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Wendy J. Lindberg, for the State.

Dylan J.C. Buffum for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

Billy Russell Land (Defendant) appeals from two Orders entered on 29 July 2019, finding him in criminal contempt. The Record reflects the following:

Following a trial in Forsyth County District Court, Defendant was found guilty of: (I) operating a motor vehicle on a street or highway while displaying an expired registration plate on the vehicle knowing the same to be expired; (II) operating a motor vehicle on a street or highway without having a current electronic inspection authorization for the vehicle, such vehicle requiring inspection in North Carolina; and (III) operating a motor vehicle on a street or highway with no liability insurance. Defendant appealed these convictions to Superior Court.

Defendant appeared for a calendar call in Forsyth County Superior Court on 29 July 2019. Defendant, found indigent by the trial court, waived his right to counsel for the appeal of his traffic violations and appeared pro se. After a contentious calendar call—during which the trial court determined Defendant was continuously interrupting the court and Defendant was warned to stop doing so or face direct criminal contempt proceedings—and as Defendant was leaving the courtroom, he again interrupted the trial court.

At this point, the trial court ordered Defendant be brought back before it, saying, "Sir, I've warned you and warned you. And I specifically just said do not interrupt my court again as I'm going on, and you made a comment as you went walking out the door very loudly." The trial court informed Defendant it was beginning a summary direct criminal contempt proceeding against him. The trial court provided Defendant the opportunity to respond to the allegations of criminal contempt, asking Defendant if there was anything he wished to say. Defendant argued, "I'm under the Constitution. This is an expired plate matter. Under the Constitution, it says it carries no jail time." The trial court explained Defendant was not being tried for the traffic citations at the moment but rather for direct criminal contempt. Defendant continued speaking over the trial court as it tried to ask if there was anything else he wished to say in his defense. After Defendant concluded, the trial court found Defendant in direct criminal contempt, sentencing him to twenty-four hours in the Forsyth County jail. Defendant gave notice of appeal in open court.

Defendant then asked, "How you gonna to [sic] place me under arrest, man? Y'all doing some illegal shit, man. I'm under the Constitution. The Haile -- the Haile is my law." The trial court warned Defendant if he

interrupted the trial court again, it would hold him in contempt for a second time. Ignoring the trial court, Defendant went on, "I'm a Hebrew Israelite from the Tribe of Judah. I'm not a US citizen. Y'all not got a right to do this." As the bailiff tried to escort Defendant from the courtroom, he continued, "Y'all doing some illegal shit in here." At this point, the trial court called Defendant before it once more to commence a second criminal contempt proceeding. As the trial court moved through the proceeding, Defendant continued interrupting and speaking over the trial court. He again expressed wanting to file a notice of appeal, saying, "My lawyer's Yahweh Yahweh Yahweh[.]" To the trial court, Defendant said:

> I don't know who you think you are, ma'am, but you supposed to follow the Constitution. Under Bryant [sic] versus United States, it says that the Court must be watchful for the constitutional rights of the people and the citizen. Now, you're not doing that ma'am -- you're up here being arrogant -- because I had a question to ask you about whether my court date was going to be today.

Defendant continued speaking as the trial court concluded the proceeding and again found Defendant in contempt of court. This time, Defendant was sentenced to thirty days in the Forsyth County jail. As the bailiff took him away, Defendant repeatedly gave notice of appeal in open court.

On 29 June 2019, the trial court entered two Orders finding Defendant in criminal contempt. In the first Order (19 CRS 1781 Order), the trial court sentenced Defendant to thirty days' imprisonment. In the second Order (19 CRS 1789 Order), the trial court also sentenced Defendant to thirty days' imprisonment, which was to run consecutively to Defendant's sentence in the 19 CRS 1781 Order.

Issues

On appeal, Defendant does not challenge the underlying bases of the Orders finding him in criminal contempt; rather, he focuses his arguments on whether he was deprived of the right to counsel in those proceedings and on errors in the entry of the Orders themselves. Thus, the dispositive issues are whether (I) the right to counsel granted under N.C. Gen. Stat. § 7A-451(a)(1) applies in a summary direct criminal contempt proceeding and (II) the trial court erred or committed clerical errors in entering its sentences in both the 19 CRS 1781 and 19 CRS 1789 Orders.

Analysis

I. Statutory Right to Counsel

[1] Defendant first argues the trial court deprived him of his statutory right to counsel. "[A]lleged statutory errors are questions of law and as such, are reviewed *de novo*." *State v. Johnson*, 253 N.C. App. 337, 345, 801 S.E.2d 123, 128 (2017) (citation and quotation marks omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation and quotation marks omitted).

The trial court held Defendant in direct criminal contempt. Pursuant to Section 5A-13(a), direct criminal contempt occurs when the act:

> (1) Is committed within the sight or hearing of a presiding judicial official; and
>
> (2) Is committed in, or in immediate proximity to, the room where proceedings are being held before the court; and
>
> (3) Is likely to interrupt or interfere with matters then before the court.

N.C. Gen. Stat. § 5A-13(a)(1)-(3) (2019). In addition, "[t]he presiding judicial official may punish summarily for direct criminal contempt according to the requirements of [N.C. Gen. Stat. § 5A-14.]" *Id.* § 5A-13(a). The requirements of N.C. Gen. Stat. § 5A-14 for imposing contempt in a summary proceeding are:

> (a) The presiding judicial official may summarily impose measures in response to direct criminal contempt when necessary to restore order or maintain the dignity and authority of the court and when the measures are imposed substantially contemporaneously with the contempt.
>
> (b) Before imposing measures under this section, the judicial official must give the person charged with contempt summary notice of the charges and a summary opportunity to respond and must find facts supporting the summary imposition of measures in response to contempt. The facts must be established beyond a reasonable doubt.

Id. § 5A-14(a)-(b) (2019).

Defendant contends he was entitled to counsel pursuant to N.C. Gen. Stat. § 7A-451(a)(1), which provides: "An indigent person is entitled to the services of counsel in . . . (1) Any case in which imprisonment, or a fine of five hundred dollars ($500.00), or more, is likely to be adjudged." *Id.* § 7A-451(a)(1) (2019). The issue of whether Section 7A-451(a)(1)'s right to counsel applies in a summary direct criminal contempt proceeding is a question of first impression for our courts. In answering this question, we do, however, begin to find guidance for our analysis in our Supreme Court's decision in *Jolly v. Wright*. *See* 300 N.C. 83, 265 S.E.2d 135 (1980), *overruled on other grounds by McBride v. McBride*, 334 N.C. 124, 431 S.E.2d 14 (1993).

In *Jolly*, the sole question before the Court was "whether an indigent defendant has a statutory or constitutional right to be represented by appointed counsel in *civil* contempt proceedings[.]" *Id.* at 85, 265 S.E.2d at 138 (emphasis added). The defendant in *Jolly* contended Section 7A-451(a)(1), the subsection at issue in the present case, granted him a right to counsel in civil contempt proceedings because in such a proceeding, defendant argued, he was subject to imprisonment. *Id.* Accordingly, our Supreme Court, although not discussing direct criminal contempt, analyzed Section 7A-451(a)(1) in answering the question before it.

The Court first noted, "[t]he intent of the Legislature controls the interpretation of a statute." *Id.* at 86, 265 S.E.2d at 139 (citation omitted). The *Jolly* Court then described its holding in *State v. Morris*, which was decided in the wake of *Gideon v. Wainwright*,[1]—"the Sixth Amendment right to appointed counsel was applicable to all felony and misdemeanor cases where the authorized punishment exceeded six months in prison and a $500 fine." *Jolly*, 300 N.C. at 87, 265 S.E.2d at 139 (citing *State v. Morris*, 275 N.C. 50, 59, 165 S.E.2d 245, 251 (1969)). *Morris*'s holding was codified by our General Assembly in the original version of Section 7A-451(a)(1). *Id.*

In *Argersinger v. Hamlin*, however, the Supreme Court of the United States expanded on *Gideon*, holding the Sixth Amendment required: "absent a knowing and intelligent waiver, no person may be imprisoned for *any offense*, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." 407 U.S. 25, 37, 32 L. Ed. 2d 530, 538 (1972) (emphasis added) (footnote omitted). As recognized by the *Jolly* Court, our General Assembly amended Section

1. 372 U.S. 335, 9 L. Ed. 2d 799 (1963).

7A-451(a)(1) into its current form in a direct response to *Argersinger*. *Jolly*, 300 N.C. at 87, 265 S.E.2d at 139 (citation omitted).

The *Jolly* Court stated: "It is clear, then, that the purpose of [Section] 7A-451(a)(1), as presently written, is to state the scope of entitlement to court appointed counsel in Sixth Amendment cases in light of current constitutional doctrine." *Id.* at 87, 265 S.E.2d at 140 (footnote omitted). "Use of the phrase '[a]ny case' [in Section 7A-451(a)(1)] is responsive to the precise holding of *Argersinger*, which states that the Sixth Amendment precludes *imprisonment* of a person for 'any offense,' however classified, unless he was represented by counsel at his trial. The words '[a]ny case' in [Section] 7A-451(a)(1) must therefore be construed as any criminal case *to which Sixth Amendment protections apply*." *Id.* at 87-88, 265 S.E.2d at 140 (alterations in original) (emphasis added).

The Court in *Jolly* also pointed out beyond Subsection (a)(1), Section 7A-451 sets out a number of specific situations in civil cases in which an indigent party has a right to counsel and civil contempt is not one such situation. *Id.* at 90, 265 S.E.2d at 141. In concluding its statutory analysis, the *Jolly* Court determined, "[a] joint review of legislative history and case law developments in the area of the Sixth Amendment right to appointed counsel leaves no doubt that the purpose of [Section 7A-451(a)(1)] is to state the scope of an indigent's entitlement to court appointed counsel in criminal cases *subject to Sixth Amendment limitations*." *Id.* at 86-87, 265 S.E.2d at 139 (emphasis added).

The *Jolly* Court continued: "Given the civil nature of civil contempt, it follows that the Sixth Amendment right to counsel as set forth in *Argersinger* is inapplicable to civil contempt because that right is confined to criminal proceedings. Accordingly, if there is a right to counsel in a civil contempt action, its source must be found in the Due Process Clause of the Fourteenth Amendment[.]" *Id.* at 92, 265 S.E.2d at 142 (footnote and citations omitted). On the specific question before it, the Court in *Jolly* ultimately held, "due process requires appointment of counsel for indigents in nonsupport civil contempt proceedings only in those cases where assistance of counsel is necessary for an adequate presentation of the merits, or to otherwise ensure fundamental fairness." *Id.* at 93, 265 S.E.2d at 143.

Applying *Jolly* to the case at hand starts with a fundamental premise: "criminal contempts are crimes, and accordingly, the accused is entitled to the benefits of all constitutional safeguards." *O'Briant v. O'Briant*, 313 N.C. 432, 435, 329 S.E.2d 370, 373 (1985) (citation omitted). However, our courts and the United States Supreme Court have

consistently held the Sixth Amendment's right to counsel does *not* apply in summary direct criminal contempt proceedings. In *In re Williams*, the defendant was summarily punished for direct criminal contempt and sentenced to ten days in jail. 269 N.C. 68, 76, 152 S.E.2d 317, 323 (1967). On appeal, the defendant argued he was erroneously denied representation by counsel; however, our Supreme Court held the trial court was under no obligation to appoint counsel for the defendant. *Id.* Specifically, the Court said:

> We find no merit in the contention that the sentence was originally imposed when the contemner was not represented by counsel, or in the contention that the court was under a duty to appoint counsel for him. Summary punishment for direct contempt committed in the presence of the court does not contemplate a trial at which the person charged with contempt is represented by counsel. . . . There is no basis for the contention that to carry out the sentence would deprive him of his liberty without due process of law on the ground that he was denied a hearing or denied representation by counsel of his choice.

Id. at 76, 152 S.E.2d at 323-24.

In *In re Oliver*, the Supreme Court of the United States ruled due process of law requires one charged with criminal contempt "have the right to be represented by counsel[.]" 333 U.S. 257, 275, 92 L. Ed. 682, 695 (1948). However, the Court acknowledged there was a narrowly limited exception allowing trial courts to forego constitutional due process requirements, defined as:

> [C]harges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent demoralization of the court's authority before the public.

Id. (quotation marks omitted). *In re Oliver* therefore stands for the proposition defendants summarily punished for direct criminal contempt have no constitutional right to counsel. *See id.*; *see also Levine v. United States*, 362 U.S. 610, 616, 4 L. Ed. 2d 989, 995 (1960) (stating summary direct "[c]riminal contempt proceedings are not within 'all criminal prosecutions' to which [the Sixth] Amendment applies" (citations omitted)).

Accordingly, because *Jolly* recognized Section 7A-451(a)(1)'s "any case" language is construed as any criminal case to which Sixth Amendment protections apply and because our courts and the United States Supreme Court have consistently recognized no right to counsel under the Sixth Amendment exists in summary direct criminal contempt proceedings, application of *Jolly* here leads to the conclusion Section 7A-451(a)(1) does not apply to summary proceedings for direct criminal contempt.

Defendant astutely observes both (1) *In re Williams* pre-dated Section 7A-451(a)(1) by two years—thus, obviously not addressing a statutory right to counsel discussed in *Jolly*—and (2) *Jolly* was subsequently overruled by our Supreme Court in *McBride*. In *McBride*, our Supreme Court determined its prior analysis in *Jolly* was misplaced as it related to whether due process required appointment of counsel in *civil* contempt. Pointing to the United States Supreme Court's decision in *Lassiter v. Department of Social Services*, the *McBride* Court explained:

> [I]n determining whether due process requires the appointment of counsel for an indigent litigant in a particular proceeding, a court must first focus on the potential curtailment of the indigent's personal liberty rather than on the "civil" or "criminal" label placed on the proceeding. Where due process is concerned, "it is the defendant's interest in personal freedom . . . which triggers the right to appointed counsel."

McBride, 334 N.C. at 126, 431 S.E.2d at 16 (alteration in original) (quoting *Lassiter v. Department of Social Services*, 452 U.S. 18, 25, 68 L. Ed. 2d 640, 648 (1981)). The *McBride* Court, in overruling *Jolly*'s specific holding, concluded: "In light of the Supreme Court's opinion in *Lassiter*, we now hold that principles of due process embodied in the Fourteenth Amendment require that, absent the appointment of counsel, indigent civil contemnors may not be incarcerated for failure to pay child support arrearages." *Id*. at 131, 431 S.E.2d at 19.

Notwithstanding the analysis utilized by *McBride* and *Lassiter*, these principles have not been extended to summary direct criminal contempt proceedings in the Sixth Amendment context. Indeed, to the contrary, the United States Supreme Court has subsequently held: "the Due Process Clause does not *automatically* require the provision of counsel at civil contempt proceedings to an indigent individual who is subject to a child support order, even if that individual faces incarceration (for up to a year)." *Turner v. Rogers*, 564 U.S. 431, 448, 180 L. Ed. 2d 452, 466 (2011). In fact, in its discussion, the *Turner* Court

itself recognized the existing exception to the right to counsel in summary direct criminal contempt proceedings: "This Court has long held that the Sixth Amendment grants an indigent defendant the right to state-appointed counsel in a criminal case. And we have held that this same rule applies to criminal contempt proceedings (*other than summary proceedings*)." *Id.* at 441, 180 L. Ed. 2d 461-62 (emphasis added) (emphasis and citations omitted).

Thus, in light of the existing precedent from both the United States and North Carolina Supreme Courts establishing there is no Sixth Amendment right to counsel in summary proceedings for direct criminal contempt and our Supreme Court's discussion in *Jolly* establishing the right to counsel under Section 7A-451(a)(1) extends only as far as the Sixth Amendment right to counsel, we conclude, in the case *sub judice*, Defendant had no statutory right to counsel under Section 7A-451(a)(1).

We find further support for our conclusion from the contemporaneous nature of summary proceedings for direct criminal contempt. As the United States Supreme Court recognized in *Cooke v. United States*:

> To preserve order in the court room for the proper conduct of business, the court must act instantly to suppress disturbance or violence or physical obstruction or disrespect to the court when occurring in open court. There is no need of evidence or *assistance of counsel before punishment*, because the court has seen the offense. Such summary vindication of the court's dignity and authority is necessary.

267 U.S. 517, 534, 69 L. Ed. 767, 773 (1925) (emphasis added). Further, "[w]here the contempt is committed directly under the eye or within the view of the court, it may proceed upon its own knowledge of the facts and punish the offender, without further proof, and without issue or trial in any form[.]" *Id.* at 535, 69 L. Ed. at 773 (citations and quotation marks omitted); *see also State v. Yancy*, 4 N.C. 133, 133 (1814) ("The punishment, in [summary direct criminal contempt] cases, must be immediate, or it would be ineffectual, as it is designed to suppress an outrage which impedes the business of the court.").

Here, the trial court found, based on its direct observation, Defendant was continuously interrupting the trial court, causing a disturbance to the trial court's ability to properly conduct business. The trial court immediately acted in summary fashion to maintain authority over its courtroom. *See Cooke*, 267 U.S. at 534, 69 L. Ed. at 773 ("To preserve order in the court room for the proper conduct of business, the court must

act instantly to suppress disturbance or violence or physical obstruction or disrespect to the court when occurring in open court."). Since the trial court saw the contemptuous conduct first-hand, there were no questions of fact to be decided or evidence to be presented, where assistance of counsel could be especially useful. *See id.* ("There is no need of evidence or assistance of counsel before punishment, because the court has seen the offense."). As such, the trial court was free to conduct summary proceedings and dictate punishment immediately based upon its own knowledge of the events. *See id.* at 535, 69 L. Ed. at 773 (citations omitted). Therefore, the trial court did not err in summarily punishing Defendant for direct criminal contempt without affording Defendant counsel because Section 7A-451(a)(1)'s right to counsel does not apply in summary direct criminal contempt proceedings.

In reaching this conclusion—and without questioning the propriety of the use of summary proceedings for direct criminal contempt in this case—we do, however, echo the Supreme Court of Florida, which in reaching a similar conclusion observed:

> That said, the very absence of the usual constitutional protections for an individual charged with direct criminal contempt and the extraordinary power to summarily punish an individual found in direct criminal contempt to incarceration for a period of up to six months without an attorney highlights what has been emphasized in our jurisprudence. Namely, courts must exercise restraint in using this power, especially where incarceration is being considered or imposed. The purpose of permitting a court to act immediately in cases of direct criminal contempt is that the misconduct of an individual in front of the court could interfere with the court's inherent authority to carry out its essential responsibilities.

Plank v. State, 190 So. 3d 594, 604-05 (Fla. 2016).

II. Sentencing Errors

[2] Defendant next argues, and the State concedes, the trial court committed clerical errors in both the 19 CRS 1781 and 19 CRS 1789 Orders. *See State v. Taylor*, 156 N.C. App. 172, 177, 576 S.E.2d 114, 117-18 (2003) (defining a clerical error as "an error resulting from a minor mistake or inadvertence, esp. in writing or copying something on the record, and not from judicial reasoning or determination" (citations and quotation marks omitted)). "When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to

the trial court for correction because of the importance that the record speak the truth." *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) (citation and quotation marks omitted).

Here, when announcing its ruling in 19 CRS 1781, the trial court sentenced Defendant to twenty-four hours in jail. However, the trial court's 19 CRS 1781 Order provided a thirty-day sentence of imprisonment. Thus, the trial court's sentence in the 19 CRS 1781 Order reflects a clerical error. *See State v. Lawing*, 12 N.C. App. 21, 23, 182 S.E.2d 10, 11-12 (1971) (holding a clerical error exists when a judgment does not reflect what was announced in open court). Accordingly, we remand for correction of the clerical error found in the 19 CRS 1781 Order. *See Smith*, 188 N.C. App. at 845, 656 S.E.2d at 696 (citation omitted).

As for the 19 CRS 1789 Order, Defendant first argues the trial court committed a clerical error by imposing the thirty-day sentence to run consecutively with the sentence in 19 CRS 1781 where the trial court in orally announcing its ruling did not specify whether the sentence should run concurrently or consecutively. *See* N.C. Gen. Stat. § 15A-1340.15(a) (2019) ("Unless otherwise specified by the court, all sentences of imprisonment run concurrently with any other sentences of imprisonment."). In the alternative, Defendant argues the trial court's imposition of a consecutive sentence in 19 CRS 1789 constituted a substantive change to his sentence made outside of his presence, thereby violating his right to be present during sentencing. *See State v. Crumbley*, 135 N.C. App. 59, 66, 519 S.E.2d 94, 99 (1999) (citations omitted). We agree with Defendant's second argument and believe *Crumbley* controls our analysis.

In *Crumbley*, the defendant was convicted of multiple offenses, and the trial court orally rendered sentences for each conviction. *Id.* at 61, 519 S.E.2d at 96. These sentences were rendered in the defendant's presence in open court. *Id.* The trial court later entered a written and signed judgment imposing the same sentences as previously rendered but further stating the sentences would run consecutively, which had not been indicated in the previously orally rendered sentences. *Id.* On appeal, this Court vacated the sentence and remanded the matter for entry of a new sentencing judgment because the defendant was not present at the time the written judgment was entered and "[t]his substantive change in the sentence could only be made in the [d]efendant's presence, where he and/or his attorney would have an opportunity to be heard." *Id.* at 66-67, 519 S.E.2d at 99; *see also State v. Pope*, 257 N.C. 326, 330, 126 S.E.2d 126, 129 (1962) ("The right to be present at the time sentence or judgment is pronounced is a common law right, separate and apart from the constitutional or statutory right to be present at the trial." (citation omitted)).

Likewise, in the case *sub judice*, the 19 CRS 1789 Order reflected a substantive change from the sentence orally rendered by the trial court in Defendant's presence. This is so because where the trial court does not announce a sentence is to run consecutively with another sentence, a defendant's sentences are to run concurrently. *See* N.C. Gen. Stat. § 15A-1340.15(a). "Because there is no indication in this record that Defendant was present at the time the written [19 CRS 1789 Order] was entered, the sentence must be vacated and this matter remanded for the entry of a new sentencing [order]." *Crumbley*, 135 N.C. App. at 66, 519 S.E.2d at 99.

Conclusion

Accordingly, for the foregoing reasons, we hold Defendant was not entitled to counsel under N.C. Gen. Stat. § 7A-451(a)(1) where the trial court proceeded to summarily punish Defendant for direct criminal contempt. We, however, remand the 19 CRS 1781 Order for correction of the clerical error contained in that Order, and we vacate the 19 CRS 1789 Order and remand for the entry of a new sentencing order.

19 CRS 1781 IS REMANDED FOR CORRECTION OF CLERICAL ERROR.

19 CRS 1789 IS VACATED AND REMANDED.

Judges BRYANT and INMAN concur.

STATE v. ROULHAC

[273 N.C. App. 396 (2020)]

STATE OF NORTH CAROLINA
v.
PETER LEE ROULHAC, III, DEFENDANT
AND
BRYAN KELLEY, PALMETTO SURETY CORPORATION, BAIL AGENT/SURETY
AND
MARTIN COUNTY BOARD OF EDUCATION, JUDGMENT CREDITOR

No. COA19-1070

Filed 1 September 2020

Bail and Pretrial Release—forfeiture—motion for relief filed prior to final judgment—exclusive statutory grounds for relief

Where the surety moved for relief from entry of bond forfeiture prior to it becoming a final judgment, and the basis for the motion was a violation of the 30-day notice requirement of N.C.G.S. § 15A-544.4(e), the surety's motion was properly denied because the trial court lacked the authority to grant the motion. N.C.G.S. § 15A-544.5 provides the exclusive avenue for relief from forfeiture when the forfeiture has not yet become a final judgment and improper 30-day notice is not one of the seven grounds for setting aside a forfeiture pursuant to that statute.

Appeal by surety from order entered 5 August 2019 by Judge Walter H. Godwin, Jr., in Martin County Superior Court. Heard in the Court of Appeals 29 April 2020.

Brian Elston Law, by Brian D. Elston, for surety-appellant.

Daniel A. Manning for judgment creditor-appellee.

ZACHARY, Judge.

The Palmetto Surety Corporation appeals from an order denying its motions seeking, *inter alia*, "an order instructing the [c]lerk not to enter [final] judgment" of forfeiture. After careful review, we affirm the trial court's order.

Background

The undisputed facts of this case are as follows: On 14 December 2016, the Palmetto Surety Corporation ("Surety") executed a $100,000 appearance bond securing the pretrial release of Defendant Peter Lee Roulhac, III, on criminal charges pending in Martin County Superior

Court. After Defendant failed to appear in court on 5 November 2018, the trial court issued an order for his arrest. On 13 December 2018, the Honorable Wayland J. Sermons, Jr., ordered that the appearance bond be forfeited. On that same date, an assistant clerk of superior court issued a bond forfeiture notice and served Surety and Defendant with a copy of the notice of entry of forfeiture by first-class mail.

On 13 May 2019, Surety moved the trial court (1) to modify the bond forfeiture pursuant to Rule 60 of the North Carolina Rules of Civil Procedure; (2) to strike the bond forfeiture; (3) to stay the proceedings; or (4) in the alternative, to grant Surety relief from the bond forfeiture pursuant to N.C. Gen. Stat. § 15A-544.8 (2019). Surety argued that "the Clerk did not provide proper notice of the Bond Forfeiture until 38 days past the Defendant's failing to appear" for his court date, rather than within the requisite 30-day period; thus, pursuant to N.C. Gen. Stat. § 15A-544.4(e), the "notice was not timely" and the bond forfeiture could not "become a final judgment." In the alternative, Surety asserted that N.C. Gen. Stat. § 15A-544.8 "also authorizes relief when notice was not provided under" N.C. Gen. Stat. § 15A-544.4 and that the trial court "should grant relief by not enforcing the bond forfeiture." The Martin County Board of Education objected to the motion, and the trial court heard Surety's motion on 15 July 2019.

By order entered 5 August 2019, the Honorable Walter H. Godwin, Jr., denied Surety's motions and declared the bond forfeiture a final judgment as of 27 July 2019. Surety timely appealed.

Discussion

On appeal, Surety contends that the trial court erred (1) "in its application of N.C. Gen. Stat. § 15A-544.5 to situations governed by the [North Carolina] Rules of Civil Procedure"; and (2) by failing to modify the order "so it complied with . . . N.C. Gen. Stat. § 15A-544.4(e)[.]"

Standard of Review

"When the trial court sits without a jury, the standard of review for this Court is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *State v. Dunn*, 200 N.C. App. 606, 608, 685 S.E.2d 526, 528 (2009) (citing *State v. Lazaro*,190 N.C. App. 670, 671, 660 S.E.2d 618, 619 (2008)). Questions of law are reviewed de novo. *State v. Hinnant*, 255 N.C. App. 785, 787, 806 S.E.2d 346, 347-48 (2017).

Analysis

"Bail bond forfeiture in North Carolina is governed by N.C. Gen. Stat. §§ 15A-544.1 – 544.8[.]" *State v. Gonzalez-Fernandez*, 170 N.C. App. 45, 48, 612 S.E.2d 148, 151 (2005). "If a defendant who was released . . . upon execution of a bail bond fails . . . to appear before the court as required, the court shall enter a forfeiture for the amount of that bail bond in favor of the State against the defendant and against each surety on the bail bond." N.C. Gen. Stat. § 15A-544.3(a).

The defendant and each surety whose name appears on the bail bond are to be served with notice of the entry of bond forfeiture by first-class mail. *Id.* § 15A-544.4(a)-(b).

> Notice under this section shall be mailed not later than the 30th day after the date on which the defendant fails to appear as required and a call and fail is ordered. If notice under this section is not given within the prescribed time, the forfeiture shall not become a final judgment and shall not be enforced or reported to the Department of Insurance.

Id. § 15A-544.4(e).

It is well settled that "[t]he *exclusive avenue for relief* from forfeiture of an appearance bond (where the forfeiture has not yet become a final judgment) is provided in [N.C. Gen. Stat.] § 15A-544.5." *State v. Robertson*, 166 N.C. App. 669, 670-71, 603 S.E.2d 400, 401 (2004) (emphasis added). "For bonds that have not become final judgments, the trial court can only 'set aside' a forfeiture if one of seven enumerated reasons have been established," as provided in section 15A-544.5(b). *State v. Ortiz*, ___ N.C. App. ___, ___, 832 S.E.2d 474, 477 (2019).

> (b) **Reasons for Set Aside.** – Except as provided by subsection (f) of this section,[1] a forfeiture shall be set aside for any one of the following reasons, and none other:
>
> > (1) The defendant's failure to appear has been set aside by the court and any order for arrest issued for that failure to appear has been recalled . . . .

1. Subsection (f) provides that no bond forfeiture "may be set aside for any reason in any case in which the surety or the bail agent had actual notice before executing a bail bond that the defendant had already failed to appear on two or more prior occasions in the case for which the bond was executed." N.C. Gen. Stat. § 15A-544.5(f). Accordingly, subsection (f) is inapplicable here.

> (2) All charges for which the defendant was bonded to appear have been finally disposed by the court other than by the State's taking dismissal with leave . . . .
>
> (3) The defendant has been surrendered by a surety on the bail bond as provided by [N.C. Gen. Stat. §] 15A-540 . . . .
>
> (4) The defendant has been served with an Order for Arrest for the Failure to Appear on the criminal charge in the case in question . . . .
>
> (5) The defendant died before or within the period between the forfeiture and the final judgment . . . .
>
> (6) The defendant was incarcerated in a unit of the Division of Adult Correction and Juvenile Justice . . . and is serving a sentence or in a unit of the Federal Bureau of Prisons . . . at the time of the failure to appear . . . .
>
> (7) The defendant was incarcerated in a local, state, or federal detention center, jail, or prison located anywhere within the borders of the United States at the time of the failure to appear, or any time between the failure to appear and the final judgment date, and the district attorney for the county in which the charges are pending was notified of the defendant's incarceration while the defendant was still incarcerated and the defendant remains incarcerated for a period of 10 days following the district attorney's receipt of notice . . . .

N.C. Gen. Stat. § 15A-544.5(b).

Here, Surety argues that the grounds for setting aside a forfeiture as provided in section 15A-544.5(b) are inapplicable, in that Surety did not move to *set aside* the bond forfeiture, but merely to *modify* it for lack of compliance with subsection (e)'s provisions.

This Court addressed a similar issue in *State v. Sanchez*, 175 N.C. App. 214, 623 S.E.2d 780 (2005). In *Sanchez*, a notice of bond forfeiture was issued after the defendant failed to appear for his court date on 21 July 2004. 175 N.C. App. at 215, 623 S.E.2d at 780. The clerk mailed the notice of bond forfeiture to the defendant and his sureties on 27 August 2004, outside of the 30-day period prescribed by N.C. Gen. Stat. § 15A-544.4(e). *Id.* The surety then "moved to set aside the entry of forfeiture pursuant to N.C. Gen. Stat. § 15A-544.4(e) on the grounds

that [the] surety was not provided with notice of the forfeiture within thirty days after entry of forfeiture." *Id.* On appeal, we concluded that because the "surety's motion to set aside the entry of forfeiture was not premised on any ground set forth in [N.C. Gen. Stat.] § 15A-544.5," the trial court "*lacked the authority* to grant [the] surety's motion." *Id.* at 218, 623 S.E.2d at 782.

In the instant case, Surety has adroitly attempted to recharacterize its efforts to obtain relief from the entry of bond forfeiture. Nonetheless, because Surety moved for relief from the entry of bond forfeiture prior to it becoming a final judgment, N.C. Gen. Stat. § 15A-544.5 provides the "exclusive avenue for relief." *Ortiz*, ___ N.C. App. at ___, 832 S.E.2d at 478 (citation omitted); *accord State v. Knight*, 255 N.C. App. 802, 807-08, 805 S.E.2d 751, 755 (2017); *State v. Cobb*, 254 N.C. App. 317, 318, 803 S.E.2d 176, 178 (2017); *State v. Williams*, 218 N.C. App. 450, 451, 725 S.E.2d 7, 9 (2012); *Robertson*, 166 N.C. App. at 670-71, 603 S.E.2d at 401. Any relief sought for violation of N.C. Gen. Stat. § 15A-544.4(e)'s 30-day notice requirement is unavailable prior to the entry of a final judgment.

Moreover, our General Statutes provide relief from a final judgment where a surety did not receive the requisite notice. As this Court stated in *Sanchez*, N.C. Gen. Stat. § 15A-544.8 provides that the trial court may set aside a final judgment of forfeiture if "[t]he person seeking relief was not given notice as provided in" N.C. Gen. Stat. § 15A-544.4. N.C. Gen Stat. § 15A-544.8(b)(1); *Sanchez*, 175 N.C. App. at 218, 623 S.E.2d at 782. "That the General Assembly specifically made allowance for relief from final judgment of forfeiture for faulty notice, and omitted the same as a ground for relief from an entry of forfeiture, suggests the legislature made a conscious choice in this regard." *Sanchez*, 175 N.C. App. at 218, 623 S.E.2d at 782. Despite Surety's contention that this statement from *Sanchez* is merely dicta, the reasoning is nevertheless sound and persuasive.

Conclusion

In that the trial court's findings support its conclusion that Surety failed to establish any reasons for relief specified in N.C. Gen. Stat. § 15A-544.5(b), we affirm the trial court's order.[2]

AFFIRMED.

Judges DIETZ and MURPHY concur.

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2. In light of our conclusion that the trial court properly denied Surety's motion under N.C. Gen. Stat. § 15A-544.5, we need not address Surety's remaining arguments.

UNIFUND CCR PARTNERS, PLAINTIFF
v.
FRED HOKE, DEFENDANT

No. COA20-87

Filed 1 September 2020

1. Judgments—debt on purchased credit account—renewal of default judgment—motion to dismiss—Consumer Economic Protection Act—heightened pleading requirements

In an action to renew a default judgment against defendant for a debt on a purchased credit account, the trial court properly denied defendant's motion to dismiss for failure to state a claim upon which relief can be granted for an alleged failure to comply with the heightened pleading requirements of the Consumer Economic Protection Act of 2009. Because a claim had already been filed and a judgment rendered, this action involved the judgment—not the underlying debt claim—and plaintiff was not acting as a collection agency but as a party seeking to enforce a previous judgment. Therefore, the pleading requirements of the Act were inapplicable.

2. Creditors and Debtors—debt on purchased credit account—renewal of default judgment—summary judgment—no genuine issue of material fact

In an action to renew a default judgment against defendant for a debt owed on a purchased credit account where defendant did not challenge the existence or validity of the judgment or the underlying debt but, instead, argued that plaintiff failed to satisfy the pleading requirements of the Consumer Economic Protection Act of 2009—an argument rejected by the court—there was no genuine issue of material fact and the trial court's grant of summary judgment for plaintiff was affirmed.

Appeal by defendant from order entered 4 November 2019 by Judge Roy H. Wiggins and from order entered 15 August 2019 by Judge Kimberly Best in Mecklenburg County District Court. Heard in the Court of Appeals 12 August 2020.

Sessoms & Rogers, P.A., by Andrew E. Hoke, for plaintiff-appellee.

Erwin, Bishop, Capitano & Moss, P.A., by Fenton T. Erwin, Jr. and Erin C. Huegel, for defendant-appellant.

BERGER, Judge.

On August 15, 2019, the trial court entered an order denying Fred Hoke's ("Defendant") motion to dismiss, and on November 4, 2019, the trial court granted Unifund CCR Partners' ("Plaintiff") motion for summary judgment. Defendant appeals, arguing that Plaintiff was subject to heightened pleading requirements as a "collection agency" and "debt buyer," and that Plaintiff did not adhere to those requirements. We disagree.

Factual and Procedural Background

Plaintiff filed suit on April 24, 2008, seeking to collect on a debt from Defendant on a purchased credit account. On October 6, 2008, the trial court entered default against Defendant, and a default judgment was entered for the principal sum of $14,174.37, accruing interest at a rate of 8.00% per annum, and attorneys' fees of $2,499.43.

On September 25, 2018, Plaintiff filed an action to renew the default judgment obtained against Defendant, alleging that no payments had been received since entry of the default judgment. On December 28, 2018, the trial court entered default against Defendant, and a default judgment in the renewed action. However, on April 15, 2019, the trial court granted Defendant's motion to set aside the entry of default.

Subsequently, on May 15, 2019, Defendant filed a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted. Defendant argued that Plaintiff was required to comply with the heightened pleading requirements under the Consumer Economic Protection Act of 2009 (the "Act"), specifically, N.C. Gen. Stat. § 58-70-145 as a collection agency and N.C. Gen. Stat. § 58-70-150 as a "debt buyer."

In ruling on the motion to dismiss, the trial court found that Plaintiff was a licensed collection agency and "debt buyer" as defined by North Carolina law. However, the trial court also found that "this case does not arise out of conduct for which a collection agency license is required, because the Plaintiff filed suit not on a purchased debt but on a judgment that was entered in its favor." Likewise, the trial court determined that this case was "not a debt buyer action" either. Because "the debt merged into the judgment and was extinguished by the judgment[,]" the trial court concluded that this was an action on a judgment rather than a purchased debt. As a result, the trial court concluded that provisions of N.C. Gen Stat. §§ 58-70-145 and 58-70-150 were not applicable, and the trial court denied Defendant's motion to dismiss.

On May 22, 2019, Plaintiff filed a motion for summary judgment. On November 4, 2019, the trial court granted Plaintiff's motion for summary judgment, noting that there was "no dispute on the validity of the underlying debt," and thus, "no genuine issue as to any material fact."

Defendant appeals, arguing the trial court erred when it (1) denied the motion to dismiss, and (2) granted Plaintiff's motion for summary judgment.

Analysis

[1] Defendant first argues that Plaintiff failed to satisfy the heightened pleading requirements of the Act as a collection agency and "debt buyer," and therefore, the district court erred in denying his motion to dismiss. We disagree.

This Court reviews a motion to dismiss *de novo*. *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (2003).

> The motion to dismiss under N.C. R. Civ. P. 12(b)(6) tests the legal sufficiency of the complaint. In ruling on the motion the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted.

Stanback v. Stanback, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citations omitted).

The Act imposes a heightened pleading standard for causes of action filed by collection agencies and "debt buyers." *See generally* N.C. Gen. Stat. §§ 58-70-145, 58-70-150 (2019). A "collection agency" is "a person directly or indirectly engaged in soliciting, from more than one person delinquent claims of any kind owed or due or asserted to be owed or due the solicited person and all persons directly or indirectly engaged in the asserting, enforcing or prosecuting of those claims." N.C. Gen. Stat. § 58-70-15(a) (2019). Under N.C. Gen. Stat. § 58-70-145, permit holders' complaints must adhere to certain requirements:

> [i]n any cause of action that arises out of the *conduct of a business for which a plaintiff must secure a permit* pursuant to this Article, the complaint shall allege as part of the cause of action that the plaintiff is duly licensed under this Article and shall contain the name and number, if any, of the license and the governmental agency that issued it.

N.C. Gen. Stat. § 58-70-145 (emphasis added).

Additionally, a "debt buyer" is "a person or entity that is engaged in the business of purchasing delinquent or charged-off consumer loans or consumer credit accounts, or other delinquent consumer debt for collection purposes[.]" N.C. Gen. Stat. § 58-70-15(b)(4).

Pertaining to "debt buyers," § 58-70-150 states,

> in any cause of action initiated by a debt buyer, as that term is defined in G.S. 58-70-15, all of the following materials shall be attached to the complaint or claim:
>
> (1) A copy of the contract or other writing evidencing the original debt, which must contain a signature of the defendant. If a claim is based on credit card debt and no such signed writing evidencing the original debt ever existed, then copies of documents generated when the credit card was actually used must be attached.
>
> (2) A copy of the assignment or other writing establishing that the plaintiff is the owner of the debt. If the debt has been assigned more than once, then each assignment or other writing evidencing transfer of ownership must be attached to establish an unbroken chain of ownership. Each assignment or other writing evidencing transfer of ownership must contain the original account number of the debt purchased and must clearly show the debtor's name associated with that account number.

N.C. Gen. Stat. § 58-70-150.

Once a judgment is entered, other evidence of indebtedness is "extinguished by the higher evidence of record." *Sanders v. Boykin*, 192 N.C. 262, 266, 134 S.E. 643, 645 (1926) (citation omitted). Essentially, "the judgment merge[s] the debt upon which it was rendered." *Id.* at 266, 134 S.E. at 645. When this merger occurs, the judgment "becomes the evidence, and the only evidence that can be used in a court, of the existence of the original debt." *Id.* at 267, 134 S.E. at 645 (citation and quotation marks omitted).

Additionally, any cause of action on a judgment is independent from the action that resulted in a judgment, and a new suit must be filed. *Teele v. Kerr*, 261 N.C. 148, 149, 134 S.E.2d 126, 127 (1964). An independent action must be "brought to recover judgment on a debt." *Raccoon Valley Inv. Co. v. Toler*, 32 N.C. App. 461, 463, 232 S.E.2d 717,

718 (1977) (citation omitted). Thus, the same procedure of "issu[ing] a summons, filing of complaint, servi[ng the complaint]" must be performed to recover on a judgment debt. *Reid v. Bristol*, 241 N.C. 699, 702, 86 S.E.2d 417, 419 (1955).

Here, the action on the judgment is a new, distinct action. Because the original debt has merged into the judgment, this is not an action on a purchased credit account, but rather, an action on a judgment. Thus, the present action does not implicate the heightened pleading requirements set forth above.

Moreover, as an action to enforce a judgment, the present action did not "arise[] out of the conduct of a business for which a plaintiff must secure a permit" as a collection agency. N.C. Gen. Stat. § 58-70-145. An action that "arises out of the conduct of a business for which a plaintiff must secure a permit" would be an initial action to collect on "delinquent claims of any kind owed" or "asserting, enforcing or prosecuting of those claims." *See* N.C. Gen. Stat. § 58-70-145; *see* N.C. Gen. Stat. § 58-70-15(a). Because a claim was already filed and a judgment was rendered, the action now before this Court involves that judgment and *not* the underlying debt claim. Thus, Plaintiff did not act in its capacity as a collection agency when filing suit in this action.

While the present action is certainly a "cause of action," the action was not filed in Plaintiff's capacity as a "debt buyer," but as a party seeking to enforce a previous judgment. Here, the Act's pleading requirement seeks to "evidenc[e] the original debt" and "establish[] that the plaintiff is the owner of the debt." N.C. Gen. Stat. § 58-70-150. In this case, a judgment was rendered on the debt, and that judgment is now the only evidence of the debt. As a result, the pleading requirements of N.C. Gen. Stat. §§ 58-70-145 and 58-70-150 are inapplicable, and Plaintiff properly stated a claim upon which relief could be granted. Therefore, the trial court did not err in denying Defendant's motion to dismiss.

II. Summary Judgment

[2] Defendant further asserts that the trial court erred when it granted Plaintiff's motion for summary judgment. We disagree.

This Court reviews an appeal of summary judgment *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). "[S]uch judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *Id.* at 573, 669 S.E.2d at 576 (citation and quotation marks omitted). "A genuine issue of material fact has been defined as

one in which the facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action[.]" *Master v. Country Club of Landfall*, 263 N.C. App. 181, 185-86, 823 S.E.2d 115, 119 (2018) (citation and quotation marks omitted).

"When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the non-moving party. Moreover, the party moving for summary judgment bears the burden of establishing the lack of any triable issue." *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) (citations omitted). Once "the moving party by affidavit or otherwise presents materials in support of his motion, it becomes incumbent upon the opposing party to take affirmative steps to defend his position by proof of his own." *Lowe v. Bradford*, 305 N.C. 366, 370, 289 S.E.2d 363, 366 (1982).

Here, Defendant does not assert that the judgment or underlying debt are invalid. Specifically, on appeal, Defendant does not challenge the existence or validity of the judgment, nor the validity of the underlying debt. Rather, Defendant argues that Plaintiff failed to satisfy the pleading requirements of the Act. Thus, there is no genuine issue of material fact.

Accordingly, we affirm the trial court's order granting Plaintiff's motion for summary judgment.

Conclusion

For the reasons explained above, the trial court properly denied Defendant's motion to dismiss and properly granted Plaintiff's motion for summary judgment. Therefore, we affirm the judgment.

AFFIRMED.

Judges DIETZ and ARROWOOD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 1 SEPTEMBER 2020)

FIRST BANK v. LATELL No. 19-868	Buncombe (16CVS3435)	Affirmed
GAMEWELL MECH, LLC v. LEND LEASE (US) CONSTR., INC. No. 19-568	Durham (16CVS3850)	Affirmed in Part; Vacated in Part; and Remanded
GILBERT v. BRANDCO, INC. No. 19-672	N.C. Industrial Commission (14-028212)	Affirmed
HOPKINS v. HOPKINS No. 19-839	Mecklenburg (10CVD16884)	Dismissed
IN RE R.H. No. 20-64	Buncombe (19SPC1689)	Affirmed
N.C. STATE BAR v. SPRINGS No. 19-1120	N.C. State Bar (18DHC25)	Affirmed
RAY v. RAY No. 19-959	Moore (13CVD1263)	AFFIRMED IN PART; REVERSED IN PART; VACATED IN PART; AND REMANDED.
ROBINSON v. ROBINSON No. 20-5	Durham (17CVD4696)	Vacated and Remanded.
STATE v. BARBOSA No. 19-1104	Durham (18CR058468)	Affirmed
STATE v. BASKINS No. 19-371	Guilford (17CRS78394)	Dismissed
STATE v. BROWN No. 19-971	Cumberland (15CRS64909)	Affirmed
STATE v. KIM No. 20-54	Guilford (17CRS30095) (17CRS81133)	No Error
STATE v. MATHES No. 19-621	Avery (17CRS50213)	No Error in Part; Vacated in Part; and Remanded.
STATE v. ROGERS No. 19-557	Pitt (16CRS57113)	Affirmed

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